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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONERS

v.

HOWARD S. ABRAMSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether information contained in records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of the Freedom of Information Act loses that exempt status when it is incorporated into records compiled for purposes other than law enforcement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Bureau of Investigation and the United States Department of Justice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is not yet reported. The orders of the district court (App. D, *infra*, 26a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and a petition for rehearing was denied on December 19, 1980 (App. B, *infra*, 23a). On March 13, 1981, the Chief Justice extended

the time within which to file a petition for a writ of certiorari to and including April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(7) of the Freedom of Information Act, 5 U.S.C. 552(b)(7), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforce-

> ment authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *.

3. The unnumbered provision following Subsection (b)(9) of the Freedom of Information Act, 5 U.S.C. 552(b)(9), provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

1. On June 23, 1976, respondent Howard S. Abramson filed a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, seeking the following documents from the Federal Bureau of Investigation (App. A, *infra*, 4a-5a):

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donahue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;
>
> —Copies of any and all information so transmitted.
>
> —An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by

which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

This request was denied on the grounds that, absent disclosure authorization from the individuals named in the request, the information came within Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. 552(b)(6) and (b)(7)(C), protecting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy" (App. A, *infra*, 5a). On August 3, 1976, Abramson filed a new and broader request that was couched in more general terms and did not include the names of specific individuals. This request was denied on the grounds that it did not reasonably describe the records sought (*id.* at 5a-6a).

On December 20, 1977, after exhausting his administrative appeals, Abramson brought this action in the United States District Court for the District of Columbia to enjoin the FBI from withholding the requested records (App. A, *infra*, 7a). The government's answer denied that Abramson was entitled to any relief, but, while the suit was pending, the FBI reprocessed Abramson's request and provided more than 80 pages of material, with deletions of

information that the government asserted came within Exemptions 1, 7(C), and 7(D) of the Act, 5 U.S.C. 552 (b)(1), (b)(7)(C), and (b)(7)(D), (*ibid*).[1] Those pages comprised four groups of records, consisting of four separate cover letters with attached materials pertaining to individuals named in the cover letters. Each letter was from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to President Richard M. Nixon, and each was dated October 6, 1969 (App. A, *infra*, 9a n.12).

The four groups of records were designated "Documents 1, 2, 3, and 4" (App. A, *infra*, 9a-10a n.12). The information currently at issue concerns portions of pages within Document 3, which consists of a cover letter from Hoover to Ehrlichman listing the names of 11 individuals about whom "name check" requests had been made, summaries of FBI file information on 10 of the 11 individuals (and, in some cases, attached copies of summaries that had been provided in response to requests from earlier administrations), a copy of an article written by one of the individuals, a Vietnam Moratorium Committee flyer, and a typed list of the individuals whose names appear on the flyer (*id.* at 9a n.12). In an affidavit dated May 2, 1978, FBI Agent Jerry R. Donahoe

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[1] Exemption 1 covers properly classified national defense or foreign policy information. Exemption 7(D) covers "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *." These exemption claims are no longer at issue in this case (App. A, *infra*, 3a n.5).

explained (May 1978 Aff. at 5-6) that the FBI periodically received name check requests from the White House regarding persons being considered for federal appointment or persons who would be attending White House functions and for whom a security check was thus necessary. When receiving a name check request, the FBI would search its files and assemble the records it possessed on the individual and would then extract pertinent information from those records and submit a memorandum to the White House (*ibid.*). As the released portions of Document 3 indicate, the FBI would in some instances simply summarize its information in a single name check summary, but if it possessed a summary prepared in response to a previous White House request concerning an individual, it would attach that summary to the new summary (May 1978 Aff., Exh. "M").

The government filed a motion to dismiss or in the alternative for summary judgment on the basis of its exemption claims and supporting affidavits. The district court denied the motion, holding (App. E, *infra*, 32a-34a), *inter alia*, that the Exemption 7 claims had not been substantiated because the government had not shown that the documents at issue were investigatory records "compiled for law enforcement purposes." The government thereafter submitted a renewed motion for summary judgment supported by a second affidavit by Agent Donahoe, in which he traced the deleted segments of information to their origins in FBI investigatory files. According to Agent Donahoe's second affidavit, virtually all the deleted segments were taken from records compiled either as part of a criminal investigation or in response to an inquiry for information concerning an individual under consideration for a government ap-

pointment (C.A. App. 29-30).[2] The affidavit did not give the reasons the White House had requested information on the 11 individuals described in the Document 3 summaries, but it again explained generally the FBI's statutory responsibility for providing name check information to aid in the determination of the suitability of candidates for federal office and in assuring the security of the President and of foreign visitors to the White House (*id.* at 27-29).

Based on the Donahoe affidavits, the government claimed that the deletions from Document 3 were exempt from disclosure under Exemption 7(C) of the FOIA. In arguing that the threshold showing of "law enforcement purposes" had been established, the government contended that the FBI was fulfilling a law enforcement function in responding to White House name check requests. The government also contended that, in any event, this requirement was met by the affidavit tracing the deleted segments to their origin in records unquestionably compiled for law enforcement purposes.

The district court rejected the government's argument that, in responding to the 1969 White House request, the FBI was generating investigatory records compiled for "law enforcement purposes" rather than for possible "political purposes" (App. D, *infra*, 26a-27a). It noted in this connection that each of the 11 individuals about whom the White House had sought information had been "prominently associated with liberal causes and/or [had] been outspoken in their opposition to the war in Indochina that was

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals. A copy of that appendix is being lodged with the Clerk of the Court.

being waged by this nation at that time" (App. D, *infra*, 27a). The court observed, however, that the government had contended "that certain materials compiled for law enforcement purposes are exempt from disclosure pursuant to exemption 7(C) because disclosure would constitute an unwarranted invasion of personal privacy," and it held that the government had "validly invoked this exemption" (*id.* at 27a).

2. Respondent Abramson appealed the district court's ruling on the Exemption 7(C) claims (App. A, *infra*, 11a & n.14), and the court of appeals reversed (*id.* at 1a-22a). The government had defended the district court's order on the ground that it correctly distinguished between the compilation of summaries in response to the 1969 White House request, a request as to which the district court found no evidence of law enforcement purposes, and the original compilations of the segments of deleted privacy information, which were identified in Agent Donahoe's second affidavit as having occurred for specific law enforcement purposes. The court of appeals concluded, however, that the district court had made two inconsistent rulings: (1) that the Document 3 records were not compiled for law enforcement purposes and (2) that nevertheless information in those records was protected from disclosure by Exemption 7(C).

The court of appeals was willing to accept, for the purposes of its decision, that the government had established that the deleted information in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes' " (App. A, *infra*, 14a). Furthermore, the court of appeals did not suggest any disagreement with the district court's finding that disclosure of the information would constitute an unwarranted invasion of

personal privacy. Nonetheless, the court below held that the deleted segments were outside the protection of Exemption 7(C) because the government had failed to show that the name check summaries themselves were compiled for law enforcement purposes or that the summary pages were "duplicates of any FBI investigatory documents compiled for legitimate law enforcement purposes" (App. A, *infra*, 14a-15a). It construed "the statutory scheme of the FOIA" as indicating that "exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents" (*id.* at 15a; emphasis in original). The court accordingly rejected what it characterized as the government's " 'pass through' theory" and held that "the recompiled summary documents have been improperly withheld" (*id.* at 18a).

The court of appeals noted, however, that records comprising Document 3 consisted of both name check summaries and "attachments" and that the district court had not, in making its threshold Exemption 7 determination respecting the purposes of the record compilation, made a separate inquiry as to the attachments (App. A, *infra*, 18a-19a). Because the court of appeals found itself "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created," it remanded the case to the district court "for a finding on the issue of whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original, footnote omitted).

The government's petition for rehearing, with suggestion for rehearing en banc, was denied, two judges dissenting (App. C, *infra*, 24a-25a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of the protection accorded by Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), to sensitive information collected for legitimate law enforcement purposes. In ordering disclosure of the FBI records in this case despite the district court's undisturbed finding that release would constitute an unwarranted invasion of personal privacy, the court of appeals has construed Exemption 7 in a mechanical fashion at odds with its purposes. Because the decision below has potential far-reaching consequences in regard to the receipt, compilation and dissemination of information by law enforcement agencies, and because a substantial portion of the litigation under the FOIA occurs in the District of Columbia Circuit, review by this Court is warranted.

1. The court of appeals has held that information concededly collected by an agency in the course of a legitimate law enforcement investigation and falling within one or more of the six categories that Congress recognized as deserving protection from mandatory disclosure loses that exempt status whenever it is included in a document that is created for some purpose other than law enforcement. This holding, which rests on a distinction between "documents" and "information" (App. A, *infra*, 14a-16a), undermines the purposes behind Exemption 7 of the FOIA and ignores the statute's emphasis on segregable portions of records.

a. To be sure, the FOIA applies to agency "records" that are "reasonably describe[d]" (5 U.S.C. 552(a)(3)) and empowers the district courts to order the disclosure of "records" that have been "improperly withheld" (5 U.S.C. 552(a)(4)(B)), and Exemption 7 itself refers to "investigatory records compiled for law enforcement purposes." But these references to "records" do not dictate a mindless focus on physical pieces of paper without regard to the origins of their contents or to distinctions between different portions of the contents. Indeed, the court of appeals acknowledged (App. A, *infra*, 14a-15a) that a document that is a "duplicate" of an original law enforcement record would retain its exempt status even though the original and the copy are physically distinct documents. Yet under the court's decision, even if the deleted individual segments of information in the name check summaries were derived from and were identical to segments of information in a document that the court would accept as an "investigatory record compiled for law enforcement purposes," the fact that they now appear in a different document robs them of the protections of Exemption 7 unless the second document also was compiled for law enforcement purposes. The court of appeals apparently would require disclosure of the sensitive information even if the new document contained a substantially verbatim transcription of information from the original record combined with a single new sentence, however trivial: the court's directions in connection with its remand for consideration of the "attachments" require the district court to consider whether the attached document was "a part of the FBI files prior to the White House's 'name check' requests" and whether "these original documents were sent to the White House as initially com-

piled and without *any* modification" (App. A, *infra*, 21a; emphasis added).

The court of appeals' wooden analysis suffers from the same excessive literalness that infected the court's decisions construing Exemption 7 prior to its amendment in 1974. The exemption at that time applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. (1970 ed.) 552(b)(7). In a series of cases commencing with *Weisberg* v. *United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974), the court of appeals concluded that any material that could be considered part of an investigatory file was exempt from disclosure, without regard to any legitimate reason for withholding it. As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), Congress disapproved of this " 'woode[n] and mechanica[l]' approach taken by the D.C. Circuit" (437 U.S. at 230, quoting 120 Cong. Rec. 17034 (1974) (remarks of Sen. Kennedy), *reprinted in* House Comm. on Government Operations & Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents* 335 (1975) (hereinafter "*1975 Sourcebook*")), and it changed the exemption to its present form in order to ensure that reviewing courts would focus on particular documents, not on the files in which they were placed, and would " 'loo[k] to the reasons' for allowing withholding of investigatory files before making their decisions." *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, 437 U.S. at 230, quoting 120 Cong. Rec. 17034 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 334. The decision of the D.C. Circuit in this case, which fails to consider the differing origins of portions of the records at

issue, also is unduly inflexible and applies "the language of the Exemption too literally and without regard for its underlying purposes." *NLRB* v. *Robbins Tire & Rubber Co., supra*, 437 U.S. at 231 n.11 (characterizing Sen. Hart's concern with court interpretations of Exemption 7).[8]

Congress's obvious purpose in enacting Exemption 7(C) was to guarantee the personal privacy of individuals who are the subject of law enforcement investigations or who are mentioned in the records of those investigations. See 120 Cong. Rec. 17033-17034 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 333. This purpose is seriously compromised if a transcription of that information into another document created for a purpose other than law enforcement automatically destroys the protection of the privacy clause of the exemption. Indeed, the court's construction of the statute turns Exemption 7(c) on its

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[8] In amending the FOIA in 1974, Congress was concerned with the distinction between "files" and specific material contained in files rather than the distinction between "records" and the information contained in them. This is indicated by the fact that in discussing the amendment to Exemption 7 before its enactment, the amendment's sponsor, Senator Hart, and others referred interchangeably to "documents," "records," and "information" in describing the focus of Exemption 7. See, *e.g.*, 120 Cong. Rec. 17033 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 333 ("Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available"); 120 Cong. Rec. 17033 (1974) (remarks of Sen. Kennedy), *1975 Sourcebook* 335 (explaining that he had seen no need to amend Exemption 7 when the basic FOIA amending legislation was originally introduced because "when I introduced the legislation I believe[d] that the public was secure in its right to obtain information falling within the 'investigatory file' exception to disclosure mandated by the act").

head. In this case, for example, if the White House requested the name check summaries for improper political purposes and, as a result, personal information culled from law enforcement records was incorporated into a separate document and divulged to government officials who had no good reason to see it, it is difficult to understand why Congress would have intended that the privacy interests of the individuals in question should be further compromised by disclosure of the sensitive information to any member of the public who requests the new document in which it is transcribed. See *Irons* v. *Bell*, 596 F.2d 468, 474 (1st Cir. 1979) (construing "law enforcement purposes" broadly so as not to penalize innocent individuals with invasions of their privacy because a particular investigation exceeds permissible limits); *Kuehnert* v. *FBI*, 620 F.2d 662, 666-667 (8th Cir. 1980).[4] The court of appeals' holding also would

[4] The First Circuit in *Irons* observed (596 F.2d at 474) that "[t]he character of the materials excluded under Exemption 7 at least suggests that 'law enforcement purpose' is as much a description of the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties." The court concluded (*ibid.*) that, for this reason and for "strong policy reasons[,]" Exemption 7 should be read as extending "to all investigative files of a criminal law enforcement agency." The permissibility of withholding such materials, however, would depend upon whether they came within one of the six specific categories of information Congress deemed deserving of protection.

Whether the rationale of *Irons* might apply in this case so as to bring all of the pages of Document 3 initially within Exemption 7 without regard to the origin of their contents is not at issue here. Our argument in this Court, as in the court of appeals, extends only to those portions of the records that are traceable to records of earlier law enforcement investigations.

seemingly prevent the government from relying on Exemption 7(D) to delete the name of an informant or confidential information supplied by an informant, if the informant's name or the information he provided were transferred from a document compiled for law enforcement purposes to a different document prepared for purposes other than law enforcement. See *Irons* v. *Bell*, *supra*, 596 F.2d at 474-475; *Kuehnert* v. *FBI*, *supra*, 620 F.2d at 667-668. See also *Sands* v. *Murphy*, 633 F.2d 968 (1st Cir. 1980) (Exemption 7(D) protection not lost by virtue of fact that promise of confidentiality to an informant is made by a state agency that then transfers the information to the FBI).

It also bears emphasis that the deletions at issue here do not pose any threat to open government (see *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974)) or frustrate the FOIA's overriding goal "to ensure an informed citizenry * * * and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, 437 U.S. at 242. The items the FBI seeks to withhold do not conceal the fact that a presidential aide requested information on 11 specified individuals or that the FBI responded to that request in the manner in which it customarily complied with White House "name check" requests. The withholding merely protects the personal privacy interest of these individuals and of third parties referred to in their files. Compare *Columbia Packing Co.* v. *United States Dep't of Agriculture*, 563 F.2d 495, 499-500 (1st Cir. 1977).[5] Because the sensitive privacy information

[5] The court of appeals' analysis cannot be justified as an interpretation of the FOIA sensitive to this distinction, because it would permit withholding of large segments of *origi-*

was derived from law enforcement records, Congress intended to exempt this information from mandatory disclosure.

b. The court of appeals' approach is also inconsistent with the requirement in 5 U.S.C. 552(b) that "[a]ny reasonably segregable portion of a record" be "provided to any person requesting such record after deletion of the portions which are exempt under" subsection (b). This provision, which applies to all exemptions, was added by Congress in 1974 on the implicit assumption that an agency record is not necessarily a seamless web of information that is either totally exempt or totally non-exempt. A court must differentiate among the record's various parts. As Senator Kennedy, a sponsor of the 1974 FOIA amendments explained, "if exempt portions of the requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed." 120 Cong. Rec. 17017 (1974), *1975 Sourcebook* 288. That is precisely what the district court permitted here.

2. The court of appeals' construction of Exemption 7 in this case is likely to have substantial harmful consequences. The rationale of the court's decision clearly applies to investigatory file information coming within any of the six categories listed in Exemption 7, and it also logically applies to all such information in documents prepared for any purpose, whether or not legitimate, that does not qualify as law enforcement.

A few examples illustrate the seriousness of the potential problem. We are advised, for instance, that

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nal law enforcement files transmitted to other persons or agencies without regard to the purpose for the transmittal. See note 6, *infra*.

the FBI on occasion transmits information from its investigatory records to the State Department, where the information may be included in documents prepared by the Visa Office for use in making decisions on visa applications or in documents sent to United States embassies abroad when foreign governments seek assurances that they are dealing with reputable persons in business negotiations. In addition, the FBI sometimes receives requests from congressional committees investigating criminal activities with a view to enacting new legislation, and it responds with documents summarizing file information rather than with boxes of raw files. Other law enforcement agencies provide similar assistance. In each of these examples, the new documents, although prepared for legitimate purposes, presumably would not qualify as "investigatory records prepared for law enforcement purposes" under the D.C. Circuit's reading of the FOIA, and accordingly information exempt under Exemption 7 at its origin would have to be disclosed.[6]

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[6] Under the court of appeals' reading of Exemption 7, of course, the FBI may avoid disclosure simply by transmitting a copy of its *original* investigative record rather than by incorporating portions of the record into a new document. Relying on *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the court below observed that, "[w]hile the use to which the information contained in records exempt under (b)(7) may change, the nature of the document itself does not" (App. A, *infra*, 20a). But this "remedy"—attaching complete, raw investigative files rather than merely quoting, paraphrasing or summarizing portions of the file in another document—only emphasizes the court's excessively literal interpretation of the exemption. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

The court of appeals' decision will prove particularly burdensome for the FBI and other federal agencies because every withholding of agency records under the FOIA may be challenged in the District of Columbia Circuit. See 5 U.S.C. 552(a)(4)(B). Indeed, current Department of Justice figures reveal that 44% of the FOIA suits brought in Fiscal Year 1980 were filed in this circuit.[7] Hence, the FBI and

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[7] The decision in this case has already been relied on by two district judges in the District of Columbia Circuit. In *Pratt* v. *Webster*, Civil Action No. 78-1688 (D.D.C. Feb. 12, 1981) (pending on government's motion for reconsideration), the district court denied the government's Exemption 7(C) and 7(D) claims with respect to information in certain documents generated in the FBI's counterintelligence program known as "COINTELPRO" without regard to whether the deleted material was taken from records compiled in connection with legitimate law enforcement investigations.

In *Playboy Enterprises, Inc.* v. *United States Dep't of Justice*, Civil Action No. 80-1172 (D.D.C. Mar. 31, 1981), the district court found (slip op. 17-18) that a report prepared by the Justice Department's Office of Professional Responsibility (OPR) for the Attorney General with respect to the activities of Gary Thomas Rowe, Jr., an FBI informant used in investigations of activities of the Ku Klux Klan, was not an "investigatory record compiled for law enforcement purposes." Relying on *Abramson*, the court explained (slip op. 18) that the report could not be considered an "extension" of the original FBI law enforcement files which the report in part summarized and that because the report failed "independently" to "qualify as an investigatory record compiled for law enforcement purposes" the government could not "rely on Exemption 7 to withhold portions of the Report to the extent that it does." The court then nonetheless upheld the government's Exemption 7(C) and 7(D) claims for certain material in the Report. We believe that the district court erred both in holding that the OPR Report did not itself qualify as an Exemption 7 investigatory record and in holding that the exempt status of the files from which the deleted materials in

other agencies with custody of documents containing law enforcement information that would have to be divulged under the decision below cannot easily afford to await a contrary decision on the issue by another circuit. In these circumstances, this Court should grant review to consider whether the court of appeals' holding that the FBI must disclose the sensitive privacy information at issue in this case is faithful to the language of Exemption 7 and the important interest it protects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1981

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question were taken is irrelevant. It seems clear, however, that, given the district court's conclusions on these two issues, its decision to uphold the Exemptions 7(C) and 7(D) claims cannot be squared with the D.C. Circuit's holding in *Abramson*. The district court's inability to accept the logical result of *Abramson* is eloquent testimony to the fact that the court of appeals' construction of the FOIA is at odds with congressional intent.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil No. 77-2206)

Argued September 5, 1980

Decided October 24, 1980

Before: WRIGHT, *Chief Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* Edwards.

EDWARDS, *Circuit Judge:* This appeal raises an issue concerning the obligation of the Federal Bureau of Investigation (FBI) to furnish information pursuant to a citizen request made under the Freedom of Information Act (FOIA).[1] During the period from

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[1] 5 U.S.C. § 552 (1976).

1969 through 1974, during the incumbency of former President Nixon, the FBI transmitted documents pertaining to various public personalities to the White House; these documents were compiled by the FBI in response to requests received from the White House. Petitioner, Howard S. Abramson, initially sought to obtain these documents through a request for information, under the FOIA, which was submitted to the FBI in June of 1976. After several attempts to secure the documents from the FBI proved unsuccessful, Petitioner filed suit on December 20, 1977 in the United States District Court for the District of Columbia to compel disclosure.

During the pendency of the suit in District Court, the FBI reprocessed Abramson's request and provided him with a portion of the materials sought. However, in response to the request for the remaining unreleased documents, the FBI asserted three statutory exemptions from the disclosure requirements of the FOIA. In particular, the FBI claimed that the disputed documents were protected from disclosure under Exemptions (b)(1),[2] (b)(7)(C),[3] and (b)(7)(D).[4]

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[2] 5 U.S.C. § 552(b)(1). Exemption 1 authorizes withholding of documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

[3] 5 U.S.C. § 552(b)(7)(C). Exemption (7)(C) authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy. . . ."

[4] 5 U.S.C. § 552(b)(7)(D). Exemption (7)(D) authorizes withholding of documents that are "investigatory records

Following several hearings before the District Court, the issues narrowed; as a consequence, the sole question remaining for resolution on this appeal is the applicability of a claimed exemption under section (b) (7) (C).[5] The documents here in question include one letter, with attachments, *see* note 12, *infra*, referred to as "name check" responses. These "name checks" are summaries of information from FBI files on certain public personalities which had been prepared pursuant to requests received from the White House. The District Court found that "there has been absolutely no showing that these particular records were compiled for law enforcement purposes," and ruled that, since "the defendants have failed to meet their burden . . . summary judgment will be granted in favor of the plaintiff on this point."[6] However, the District Court also found that the disputed documents were "exempt from disclosure pursuant to exemption (7) (C) because disclosure would constitute an unwarranted invasion of personal privacy."[7] Petitioner challenges this latter ruling denying disclosure of the requested documents.

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compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . ."

[5] Petitioner no longer challenges the FBI's claimed exemptions under § (b) (1) and § (7) (D). Petitioner's brief at 10.

[6] Petitioner's appendix (App.) at 73. These rulings appeared in an Order of the District Court which was issued on November 30, 1979. App. at 72-73.

[7] App. at 73.

Upon a careful review of the record in this case, we find that the District Court misapplied the law with respect to the applicability of Exemption (7)(C) to the "name check" summaries. We therefore reverse on this point, with an instruction that the summaries be released to Petitioner. With regard to the materials attached to the "name check" summaries, we remand for further proceedings for a determination by the District Court as to whether the attachments were "compiled for law enforcement purposes" and, if so, whether these documents are thus exempt from disclosure under section (7)(C).

I. Background

Petitioner, a professional journalist, has stated that "[t]he requests which are the subject of this lawsuit grow directly out of [his] interest in the extent to which the White House may have used the F.B.I. and its files to obtain derogatory information about political opponents and those that it perceived as enemies." App. at 11.

Petitioner first filed his FOIA request on June 23, 1976, App. 5, in a letter to Clarence M. Kelley, then the Director of the FBI. Petitioner's request sought the following documents:

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donahue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;

—Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

App. at 5.

By letter dated July 23, 1976, Kelley notified Petitioner that the Bureau would not search its files to determine whether it had the requested information until Petitioner obtained notarized authorization for the disclosure of the information from the subjects of the request. App. at 7. Kelley indicated that, without such authorization, the information would be "exempt from disclosure pursuant to Title 5, United States Code, Section 552(b)(6), which exempts information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy and/or (b)(7)(C), which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy." App. at 7.[8]

After receiving Kelley's response, Petitioner assumed that his initial "request was too specific and

[8] The FBI no longer asserts Exemption (b)(6), 5 U.S.C. § 552(b)(6), as a justification for nondisclosure. This exemption protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

that in its specificity it violated the privacy of others." App. at 12-13. Petitioner thereafter filed a new request on August 3, 1976, seeking the following documents:

> 1. All written requests and written records of oral or telephone requests from the White House or any person employed by the White House to the FBI for information about any person who was in 1969, 1970, 1971, 1972, 1973, or 1974 the holder of a federal elective office or a candidate for federal elective office.
>
> 2. All written replies and records of oral or telephonic replies from the FBI to the White House in response to requests described in paragraph one.
>
> 3. Any index or indices to request or replies described in paragraphs one and two.

App. at 9. On August 20, 1976, Kelley denied Abramson's second request for failure to "reasonably describe the records sought" as required by 28 C.F.R. § 16.3(b) (1979).[9]

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[9] The reference to 28 C.F.R. § 16.3(b) appears in the Department of Justice's regulations pertaining to Production or Disclosure of Material or Information under the FOIA. 28 C.F.R. § 16.1 (1979). 28 C.F.R. § 16.3(b) provides that:

> (b) *Request should reasonably describe the records sought.* A request for access to records should sufficiently identify the records requested to enable Department personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester. If the request relates to a matter in pending litigation, the court and its location should be identified.

After unsuccessfully appealing both denials within the agency, Abramson filed suit, on December 20, 1977, in the United States District Court for the District of Columbia to enjoin the FBI from withholding the records and to make the records immediately available to him. The FBI responded to Abramson's suit by denying all liability under the FOIA, as it had done throughout the administrative appeals. During the pendency of this action, the FBI reprocessed Abramson's requests and provided him with eighty-four pages of documents—some intact, and some with deletions. The Government claimed that the deleted material was protected from disclosure under Exemptions (b)(1), (b)(7)(C) and (b)(7)(D).[10]

On the Government's motion for dismissal or, alternatively, summary judgment, the District Court issued an order on January 3, 1979, requiring the Government to allow Petitioner to modify his second request to more reasonably describe the documents sought, and requiring the Government to re-evaluate the nondisclosed material claimed exempted under (b)(1) in light of Executive Order 12065, 43 Fed. Reg. 28,949 (1978).[11] App. at 18, 20. In addition, the District Court denied the Government's motion with respect to Exemptions (7)(C) and (7)(D), pending a showing that the documents for which the exemptions were claimed were compiled for law enforcement and not political purposes. App. at 18-19. The District Court noted that the only evidence before it to indicate that the records were

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[10] *See* notes 2, 3 and 4, *supra*.

[11] Executive Order 12065 superceded Executive Order 11652, as amended, 50 U.S.C. § 401 (1978), on December 1, 1978.

compiled for law enforcement purposes was the Government's assertion that:

> The documents which are at issue in this proceeding were compiled by the FBI pursuant to requests by the White House and were transmitted by the Bureau to a senior White House official, John D. Ehrlichman. Thus, the records plaintiff seeks were compiled pursuant to the investigative authority of the FBI.

App. at 18.

In its January 3, 1979 Memorandum Opinion and Order, the District Court cited *Weisberg* v. *United States Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974), which held that, notwithstanding the Attorney General's designation of certain investigatory files as having been compiled for law enforcement purposes, "his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper." App. at 19. The District Court Memorandum Opinion also noted that:

> The Court does not full [*sic*] understand the government's logic that because the records were compoled at the White House's request, they are "thus" investigatory. Moreover, this contention does not even address the issue whether the records were compiled for "law enforcement" rather than political purposes.

App. at 19. The District Court thus found the bald assertion of exemption by the FBI to be an insufficient basis from which to determine the proper classification of the documents. *Id.*

On September 6, 1979, the FBI submitted an affidavit to the District Court describing in detail the four documents that were processed in response to Petitioner's request, and an explanation in each instance of the justifications for nondisclosure.[12] On

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[12] The affidavit describes the four documents as follows:

A. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34727, with enclosures, regarding FBI name checks on William J. Harris, J. Keith Mann, Dr. Karl Augustus Menninger, Howard Pyle and Wilbur Hughes Strickland, M.D. Also accompanying the document is a list of names reflecting the name check request from the White House. [Document No. 1.].

B. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 65-5-34728, with an enclosure relating to an FBI name check on Archie Floyd Weaver. Also accompanying the document is a letter dated October 2, 1969, reflecting the name check request from the White House. [Document No. 2].

C. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 65-5-34736, with enclosures relating to FBI name checks on Cesar Estrada Chavez, Joseph Duffey, Maurice Eisendrath, John Kenneth Galbraith, Richard N. Goodwin, Fannie Lou Hamer, Dr. Reinhold Nieburh, Paul Schrade, Adam Walinsky and Dr. George Wiley. Also among the enclosure is a copy of an article written by John Kenneth Galbraith, a Vietnam Moritorium Committee Flyer, and a typed list containing the names of certain individuals whose names appeared on the flyer. [Document No. 3].

D. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34747, with enclosures relating to FBI name checks on George W. Barton and C. Monroe Shigley. Also accompanying the document is a letter dated October 3, 1969,

the basis of this affidavit, and the eighty-four pages of documents that the FBI had previously released, Petitioner submitted a modified request on September 25, 1979, seeking only the material withheld from "Document No. 3." App. 47. Document No. 3 includes a one-page memorandum, dated October 6, 1969, from J. Edgar Hoover to John D. Ehrlichman, plus approximately sixty-three pages of "name check" summaries and attachments. The "name check" summaries detail information, culled from FBI files, on eleven public personalities.[18]

On November 30, 1979, the District Court ruled on the parties' cross-motions for summary judgment with respect to the material withheld from Document No. 3. Finding once again that the FBI had failed to show that the information was compiled for law enforcement rather than political purposes, the District Court ruled that:

> The document at issue concerns information requested by and transmitted to the Nixon White House concerning eleven individuals. Each of these eleven individuals has been prominently associated with liberal causes and/or has been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time.
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> The defendants contend that the White House "name check" requests qualify as records compiled for law enforcement purposes because the White House has special security and appoint-

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reflecting the name check request from the White House. [Document No. 4].

[18] See names listed in paragraph "C," note 12, *supra*. Affidavit of Special Agent Jerry R. Donahoe. App. at 21, 25-26.

> ment functions. At no point in their pleadings do the defendants relate these broad and general duties to the individuals about whom information was requested from the FBI. Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point.

App. at 72-73. However, the District Court then went on to rule that Exemption (7)C) was validly invoked by the Government because disclosure of the withheld materials would constitute an unwarranted invasion of personal privacy. The District Court thus granted the Government's motion for summary judgment "with respect to material withheld pursuant to Exemption . . . (7) (C)." *Id.*[14]

II. Applicability of Exemption (7)(C) to the "Name Check" Summaries.

The primary issue presented here for our review is whether the District Court erred in upholding the nondisclosure of certain documents pursuant to Exemption (7) (C), when it found that the Government had failed to carry its burden of proof in demonstrating that the withheld documents were compiled for law enforcement purposes.

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[14] The District Court also granted the Government's motion for summary judgment with respect to Exemption 1, finding that the Government had properly classified certain deleted material under the national security exemption. Petitioner does not challenge this portion of the District Court order on this appeal.

Petitioner argues that the District Court's ruling on the application of Exemption (7)(C) was plainly erroneous because the FOIA clearly prohibits the withholding of documents under Exemption (7)(C) unless the documents are found to have been compiled for "law enforcement purposes."

The Government argues that the District Court correctly concluded that Exemption (7)(C) was properly invoked to justify the withholding of the documents, notwithstanding its finding that the FBI's compilation of the "name check" summaries was not done for law enforcement purposes. On this point, the Government contends that Exemption (7)(C) is applicable because the "name check" summaries were based on information contained in documents in FBI files that were originally created for law enforcement purposes. As part of its proof on this point, the Government submitted the affidavit of Special Agent Donahoe; this affidavit indicated that each individual segment of information withheld had been traced in order to verify the specific character of each segment as investigatory material obtained by the FBI in connection with a specific law enforcement purpose. App. at 29. In effect, the Government argues that the District Court's conclusion that the Government had failed to demonstrate that the "name check" responses were compiled for law enforcement purposes is not fatal to its claim of exemption under section (b)(7)(C).

The threshold inquiry regarding any document for which a section (b)(7)(C) exemption is claimed is whether such document has been shown to be an investigatory record, which was "compiled for law enforcement purposes." In the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, published in February of

1975 as a guideline for the implementation of the Act, a three-pronged test is set out for determining the applicability of section (b)(7)(C) to documents:

> Once it is determined that [the threshold requirements of] "investigatory record" [and] "compiled for law enforcement purposes" [have been met], *the next* question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7.[15]

A simple reading of the applicable provisions of the FOIA plainly supports this interpretative memorandum by the Attorney General. Thus, it is axiomatic that any consideration of whether disclosure would constitute an "unwarranted invasion of personal privacy" is premature until the documents in issue have been shown by the Government to be investigatory records which were compiled for law enforcement purposes.

Moreover, the Government agency bears the *full burden of proof* in establishing that the requirements of an exemption have been met before it can withhold a requested document from disclosure. *Jordan* v. *United States Department of Justice*, 591 F.2d 753, 779 (D.C. Cir. 1978) (en banc). *See also Exxon Corp.* v. *Federal Trade Commission*, No. 79-1995, slip op. at 11 (D.C. Cir. Oct. 3, 1980). The District Court, having properly concluded that the Government failed to sustain its burden of demonstrating that the documents were compiled for law enforce-

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[15] The Attorney General's Memorandum is cited at pp. 15-16 in petitioner's brief. *See also Lesar* v. *United States Dep't of Justice*, No. 78-2305, slip op. at 27-29 (D.C. Cir. July 15, 1980).

ment purposes, erroneously extended its analysis in finding that disclosure would constitute an unwarranted invasion of personal privacy. These two rulings, when taken together, are inconsistent with the plain mandate of the FOIA. We hold that the "name check" summaries, which the District Court found were compiled solely for use by the White House for purposes having nothing whatsoever to do with "law enforcement," were improperly withheld under the FOIA.

III. The Distinction Between "Documents" and "Information"

Although the Government acknowledged that the "name check" summaries were not compiled for law enforcement purposes, the claim is made that nondisclosure was justified because

> [a]ll of the *information* withheld was *originally* obtained and compiled by the FBI in connection with either a background investigation of an individual being considered for an official appointment or else an investigation into a suspected violation of law.

Appellee's brief at 9 (emphasis added). In other words, the Government asserts, and Petitioner does not directly dispute, that the *information* used to compile the "name check" summaries came from FBI documents that were compiled for legitimate "law enforcement purposes."

Even if we accept the truth of the Government's assertion, we are still left with undisputed facts indicating that: (1) the "name check" summaries were originally developed pursuant to a request from the White House for information about certain public personalities; (2) the "name check" summaries were

not duplicates of any FBI investigatory documents that were compiled for legitimate law enforcement purposes; and (3) the documents constituting the "name check" summaries were not compiled for any legitimate law enforcement purposes.

Without passing on whether the original FBI files were compiled for legitimate law enforcement purposes, the District Court properly distinguished between the "name check" summaries and the original FBI files. It is the non-disclosure of only the "name check" summaries that is in issue in this case. It is with respect to these documents that the District Court found that the Government had failed to show a legitimate law enforcement purpose. The Government on appeal attempts to gloss over the distinction between the two sets of documents by characterizing the recompiled summaries as simply extensions of the original documents from which they derive, all bearing the same information.

However, the statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents.[16] Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA.

While the Government does indeed concede that the White House "name check" requests resulted in the production of documents which were distinct from

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[16] *See Simpson* v. *Vance*, No. 79-1889, slip op. at 11-14 (D.C. Cir. September 25, 1980) (State Department Biographic Register not exempt, even though information in Register was extracted from personnel files which may have been exempt under section (b) (6).

the underlying documents already contained in the FBI files, it did not introduce any evidence to demonstrate that the responses to the White House requests were compiled for law enforcement purposes. App. at 28. Rather, the Government simply relies on its assertion that the *underlying documents* were compiled for law enforcement purposes to meet threshold requirements of the (b)(7)(C) exemption for the "name check" summaries.

A similar argument was recently considered and rejected by this court in *Lesar* v. *United States Department of Justice*, No. 78-2305 (D.C. Cir. July 15, 1980). In *Lesar*, petitioner sought the disclosure of deletions from reports released to him that had been prepared by the Civil Rights Division and a special Task Force in the Department of Justice with respect to various FBI surveillances of Dr. Martin Luther King. The Justice Department excised certain materials, pursuant to section (b)(7)(C), which consisted of "the names and other identifying information of persons involved in the King investigation, including informants and lower-level FBI personnel, as well as information of a personal nature, the disclosure of which allegedly could embarrass Dr. King's family and associates or damage their reputations." [17]

Lesar challenged the applicability of the exemption to the withheld material on the ground that the material was not "compiled for law enforcement purposes." Lesar argued that because the FBI's surveillance had degenerated into a campaign "to discredit and to neutralize Dr. King," [18] and was unrelated to

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[17] *Lesar* v. *United States Dep't of Justice*, No. 78-2305, slip op. at 26-27 (D.C. Cir. July 15, 1980).

[18] *Id.* at 8 (quoting from the *Murphy Report*, Memorandum from Robert A. Murphy, Chief of the Criminal Section

any legitimate law enforcement purposes, it did not meet the threshold requirements set forth in section 7. In rejecting Lesar's argument, this court distinguished the underlying original surveillance records, about which it entertained "serious doubts whether [they] could be construed in their entirety as 'investigatory records compiled for law enforcement purposes,'" [19] from the Justice Department's Task Force summaries, which were at issue in the *Lesar* case. The court then noted that there was no dispute as to whether the Task Force materials were compiled during the course of a legitimate law enforcement investigation—that, in fact, one of the purposes for which the Task Force had been created was to investigate alleged improprieties in the FBI surveillances of Dr. King. The court concluded that "[w]e thus resist appellant's suggestion that we somehow should 'pass through' the Task Force notes to the underlying FBI surveillance records and inquire further into the point at which the FBI's investigation of Dr. King strayed beyond its lawful scope. We hold that the documents at issue meet the threshold requirement of subsection 7." [20]

In *Lesar* the petitioner attempted to impute the legitimate purposes associated with the compilation of the underlying documents to the Task Force summaries that were derived from the underlying documents; in this case the Government seeks to impute the legitimate purposes associated with the compila-

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of the Civil Rights Division, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division of the Department of Justice (March 31, 1976), at 138).

[19] *Id.* at 27.

[20] *Id.* at 28-29.

tion of the underlying FBI files to the "name check" summaries that were prepared for the White House. Although this case is the reverse of *Lesar*, we are constrained here, as we were in *Lesar*, to reject the "pass through" theory. Each *document* for which a section (b)(7)(C) exemption is claimed under the FOIA must first be shown to be an "investigatory record compiled for law enforcement purposes."

We agree with the District Court that the Government has failed to demonstrate that the "name check" summaries were compiled for law enforcement purposes, and accordingly find that the recompiled summary documents have been improperly withheld.

IV. Applicability of Exemption (7)(C) to the "Attachments" to the "Name Check" Summaries

There is an additional issue in this case, which, although given only cursory treatment by the parties, warrants discussion. As noted above, Document No. 3, the focus of this litigation, is composed of a one-page letter from the FBI to John Ehrlichman. Enclosed with the letter are sixty-three pages of "name check" summary memoranda *and attachments* pertaining to ten of the eleven individuals. While Petitioner argues that *none* of the FBI's responses were prepared pursuant to legitimate law enforcement purposes, and the Government argues that even if the summaries themselves have not been shown to have been compiled for law enforcement purposes, the underlying documents from which they were compiled were clearly the product of legitimate law enforcement investigations, neither party has suggested that the two types of documents comprising Document No. 3—summaries and attachments—might be treated differently under our section (b)(7)(C) analysis. Nor did

the District Court consider the summaries and attachments separately for section (b)(7)(C) purposes when it ruled that the threshold requirements for the exemption had not been met.

In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1974),[21] the Supreme Court considered a case in which documents that are arguably exempt from disclosure under FOIA are incorporated into a non-exempt document. The non-exempt documents in the *Sears* case were Advice and Appeals Memoranda prepared by the General Counsel of the National Labor Relations Board. The incorporated documents were memoranda prepared in contemplation of the litigation, and thus were exempted as "intra-agency" memoranda under section (b)(5) of the FOIA. In holding that the exempt memoranda lost their exemption in the incorporation process, the Court suggested that the character of the memoranda had been transformed from intra-agency memoranda in contemplation of upcoming litigation to memoranda explaining a final agency action. That is, the nature of the document itself was changed with the different use to which the information contained in the document was put:

> Petitioners assert that the District Court erred in holding that documents incorporated by reference in non-exempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda. We disagree.
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> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will be-

[21] *See also Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1974).

> come public is slight. First, when adopted, the reasoning becomes that of the agency and becomes *its* responsibility to defend. . . . Moreover, [there is] the public interest in knowing the reasons for a policy actually adopted by an agency. . . . Thus, we hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Id. at 161. Thus, the previously exempt predecisional documents may lose their predecisional character and become new and different post-decisional documents by their incorporation into a final agency opinion. *See Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *Bristol-Myers* v. *Federal Trade Commission*, 598 F.2d 18, 24-29 (D.C. Cir. 1978); *Niemeier* v. *Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977).

Yet, it does not follow that the "attachment" documents in the instant case, which may have been originally exempt under section 7, lost their exempt status when they were attached to the "name check" summaries. While the use to which the information contained in records exempt under section (b)(7) may change, the nature of the document itself does not. The Court in *NLRB* v. *Sears, Roebuck* recognized this difference, and held that documents exempt under section (b)(7) do not lose their exemption in the incorporation process once the exemption has attached:

> Finally, the General Counsel claims that the documents, incorporated by reference in Advice and Appeals Memoranda, which were previously pro-

> tected by Exemption 7, should not lose their exempt status by reason of incorporation. . . . [W]e think the argument is sound. The reasons underlying Congress' decision to protect 'investigatory files' . . . are as applicable to a document referred to in an Advice or Appeals Memorandum as they are to a document which is not. Therefore, a document protected by Exemption 7 does not become disclosable solely because it is referred to in a 'final opinion.'

Id. at 165-66. Moreover, we believe that even if all of the information contained in a document that is exempt under section (b)(7) becomes released through some other communication, the document itself could retain its exemption.

While we are satisfied that the "name check" summaries were not compiled for legitimate law enforcement purposes, we are less sure of the "attachments." We are unable to determine from the evidence in this case the precise nature of the "attachments" or the purposes for which they were originally created. If it is found that the "attachments" documents were already in existence and a part of the FBI files prior to the White House's "name check" requests, and that these original documents were sent to the White House as initially compiled and without any modification, then a determination would have to be made as to whether these documents meet the threshold requirements of section (b)(7).

Accordingly, we remand to the District Court for a finding on the issue of whether the "attachments" that were sent to the White House in response to its requests for "name checks" were the *original documents* from the FBI files compiled prior to the White

House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation.[22] Should the District Court on remand find that the "attachment" documents are in fact investigatory records which were compiled for law enforcement purposes, then a determination must be made as to whether the attachments are exempt from disclosure under section (b)(7)(C).

On remand, it may be appropriate for the District Court to "examine the contents of [the attachments] *in camera* to determine whether such records or any part thereof shall be withheld" under section (b)(7)(C).[23] Such *in camera* inspection should serve to avoid any further disputes or delays in this litigation.

V. Conclusion

The judgment of the District Court is reversed as to the FBI "name check" summaries. The District Court is hereby instructed to require appellee to release all of the "name check" summaries heretofore withheld pursuant to a claimed exemption under section (b)(7)(C) of the FOIA.

As to the "attachment" documents, the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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[22] *See Rural Housing Alliance* v. *United States Dep't of Agriculture*, 498 F.2d 73, 80, 82 (D.C. Cir. 1974).

[23] *See* 5 U.S.C. § 552(a)(4)(B), allowing for *in camera* inspection under the FOIA.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 77-2206

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Filed Dec. 19, 1980

Argued September 5, 1980

Before: Wright, Chief Judge, Mikva and Edwards, Circuit Judges

ORDER

On consideration of appellees' petition for rehearing, filed December 8, 1980, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 77-2206

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Argued September 5, 1980

Filed Dec. 19, 1980

Before: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court not being in favor of rehearing this matter *en banc*, it is

ORDERED by the Court, *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
Chief Deputy Clerk

Circuit Judges MacKinnon and Robb would rehear this matter *en banc.*

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-2206

HOWARD S. ABRAMSON, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
DEFENDANTS

Filed Nov. 30, 1979

ORDER

This action is before the Court on the defendants' renewed motion for summary judgment and the plaintiff's motion for partial summary judgment, an *in camera* inspection and interim relief. The plaintiff seeks records held by the Department of Justice pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b).

The major issue concerns material collected by the Federal Bureau of Investigation and forwarded to the White House pursuant to White House "name check" requests. The defendants claim that this information is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7) as investigatory records compiled for law enforcement purposes. On January 3, 1979, the Court denied the defendants' motion to dismiss or in the alternative for summary judgment on this exact issue on the ground that the agency had failed to show that the information was compiled for

law enforcement rather than political purposes. The Court finds that the defendants' renewed motion suffers from the same flaw.

The document at issue concerns information requested by and transmitted to the Nixon White House concerning eleven individuals. Each of these eleven individuals has been prominently associated with liberal causes and/or has been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time. *See* plaintiff's exhibit III.

The defendants contend that the White House "name check" requests qualify as records compiled for law enforcement purposes because the White House has special security and appointment functions. At no point in their pleadings do the defendants relate these broad and general duties to the individuals about whom information was requested from the FBI. Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point.

The defendants have also withheld some material on the basis of exemption one of the Freedom of Information Act, 5 U.S.C. § 552(b)(1). The Court finds that the defendants have properly classified such material under the national security exemption.

Finally, the defendants contend that certain materials compiled for law enforcement purposes are exempt from disclosure pursuant to exemption (7)(C) because disclosure would constitute an unwarranted invasion of personal privacy. The Court finds that the defendants have validly invoked this exemption.

Accordingly, it is, by the Court, this 30th day of November, 1979,

ORDERED, that the motion of the defendants for summary judgment be, and the same hereby is, granted with respect to material withheld pursuant to exemptions (1) and (7)(C) in that there are no issues of material fact genuinely in dispute; and in all other respect said motion is denied; and it is

FURTHER ORDERED, that the motion of the plaintiff for partial summary judgment be, and the same hereby is, granted in that there are no issues of material fact genuinely in dispute; and it is

FURTHER ORDERED, that the plaintiff's motion for, interim relief be, and the same hereby is, denied as premature.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

UNITED STATEST DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-2206

HOWARD S. ABRAMSON, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER
OF UNITED STATES DISTRICT JUDGE
CHARLES R. RICHEY

This is an action brought by the plaintiff Howard S. Abramson, a full-time writer of newspaper and magazine articles and books, under the Freedom of Information Act [hereinafter, "FOIA"], 5 U.S.C. § 552 (1976), to enjoin the government from withholding records and to order the government to make the records immediately available to plaintiff. Currently before the Court is the government's motion to dismiss, or, in the alternative, for summary judgment.

On June 23, 1976, plaintiff filed a request with the Federal Bureau of Investigation [hereinafter, "FBI"] under FOIA for:

—Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White

House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario.

—Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

In a letter dated July 23, 1976, Clarence Kelley, then Director of the FBI, requested that plaintiff obtain notarized authorization from the subjects of the request, and that barring such authorizations, the request was denied under 5 U.S.C. § 552(b)(6) and/or (b)(7)(C).

On August 3, 1976, the plaintiff made a second request:

1) All written requests and written records of oral or telephone requests from the White House or any person employed by the White House to the FBI for information about any person who was in 1969, 1970, 1971, 1972, 1973, or 1974 the holder of a federal elective office or a candidate for federal elective office.

2) All written replies and records of oral or telephonic replies from the FBI to the White House in response to requests described in paragraphy (*sic*) one.

3) All index or indices to requests or replies described in paragraphs one and two.

In a letter dated August 20, 1976, Clarence Kelley denied the plaintiff's second request contending that the request did not reasonably describe the records sought. After unsuccessful appeals within the agency, the plaintiff brought this action. Initially, the government filed an answer which categorically denied liability under the FOIA. However, during the pendency of this action, the government reprocessed plaintiff's request and provided plaintiff with a substantial number of documents—some intact, some with deletions.

I. *Material Withheld Pursuant To Exemption 1*

One of the documents released by the government has portions deleted pursuant to exemption 1, 5 U.S.C. § 552(b)(1), which provides that agencies may withhold matters that are:

> "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

According to the government, the national security deletions were classified as "secret" under Executive order 11652, as amended, 50 U.S.C. § 401 (1978). However, on June 28, 1978, President Carter promulgated Executive Order 12065, 43 Fed. Reg. 28949

et seq. By its terms, Executive order 12065 became effective on December 1, 1978, and supercedes Executive order 11652. The affidavit filed by the government in support of its exemption 1 claim does not address the new Executive order. Therefore, the Court finds that the government must reevaluate the nondisclosed material with respect to the Executive order currently in force and will deny defendants' motion as to material withheld pursuant to exemption 1 at this time.

II. *Material Withheld Pursuant To Exemption 7*

A. *Exemption 7(C)*

Four of the documents released by the government have portions deleted pursuant to exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which provides that agencies may withhold matters that are "investigatory documents compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy." The Court must deny the government's motion at this time with respect to material withheld under this exemption because the government has failed to establish that the threshold requirement of exemption 7(C), that the records withheld be "investigatory documents compiled for law enforcement purposes." The only evidence before the Court indicating that the records were compiled for law enforcement purposes is the assertion by the government that:

> The documents which are at issue in this proceeding were compiled by the FBI pursuant to requests by the White House and were transmitted by the Bureau to a senior White House

> official, John D. Ehrlichman. Thus, the records plaintiff seeks were compiled pursuant to the investigative authority of the FBI.

Motion to Dismiss, or in the Alternative, for Summary Judgment, at 9-10 (May 2, 1978). The Court does not fully understand the government's logic that because the records were compiled at the White House's request, they are "thus" investigatory. Moreover, this contention does not even address the issue whether the records were compiled for "law enforcement" rather than political purposes. The government's contentions in this case were somewhat anticipated by the U.S. Court of Appeals for the District of Columbia in *Weisberg* v. *U.S. Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc). In *Weisberg*, the court stated:

> Granted that the Attorney General may designate certain investigatory files as having been compiled for law enforcement purposes, his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper. Where the district court can conclude that the Attorney General's designation and classification are correct, the Freedom of Information Act requires no more.

Id. at 1202. There are insufficient facts currently before the Court to enable it to decide whether the records were compiled for investigatory purposes rather than for any other purpose. Therefore, the Court will deny the government's motion with respect to this exemption at this time.

B. Exemption 7(D)

The government has withheld the names of the sources of some of the information in its files under the authority of exemption 7(D), 5 U.S.C. § 552 (b)(7)(D), which exempts from disclosure records compiled for law enforcement purposes which would disclose the identity of a confidential source. The government has presented a convincing case on the issue of the need to protect the sources of the information at issue. However, no showing has yet been made that the records were "compiled for law enforcement purposes." Therefore, the Court will deny the government's motion with respect to this exemption at this time.

III. *Plaintiff's Second Request—Reasonable Description*

Plaintiff's second request asked for all White House requests for information concerning federal elective office seekers or office holders during a six year period. According to the government, the FBI does not maintain any separate file of requests from White House staff members. Thus, Bureau personnel would be required to search every special inquiry file compiled during the six year period. The Court finds plaintiff has failed to reasonably describe the requested documents. The description provided by the plaintiff is insufficient to enable a professional employee of the agency who was familiar with the subject area to locate the record with a reasonable amount of effort. *See* 12 U.S. Code Cong. & Admin. News, pp. 6207 & 6222. (Dec. 15, 1974). Although the plaintiff has failed to adequately describe the records sought, the plaintiff was not given an op-

portunity to modify his requests. The Court finds that the plaintiff should now be given that opportunity.

ORDER

Accordingly, upon consideration of the entire record herein, it is, by the Court, this 3d day of January, 1979,

ORDERED, that defendant's motion to dismiss be, and the same hereby is, denied, and it is

FURTHER ORDERED, that plaintiff shall file a more reasonable description of the documents sought in its second request within ten (10) days of the date of this order.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338678 271

FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1735

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE
UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners

v.

HOWARD S. ABRAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI: FILED APRIL 16, 1981
WRIT OF CERTIORARI: GRANTED JUNE 15, 1981

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U.S. DISTRICT COURT

Civil Action No. 77-2206

ABRAMSON

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
1977	
Dec 29	COMPLAINT, exhibits 1 thru 8, appearance.
Dec. 29	SUMMONS (4) and copies (4) of complaint issued. U.S. Atty. ser 1-3-78; All defts. ser 1-4-78.
1978	
Jan 31	ANSWER of defts. to the complaint; c/m 1-31-78. Appearance of Nicki L. Koutsis.
Jan 31	CALENDARED.
Mar 01	STATUS CALL: Deft. is re-examining the documents in question; further status call set 3-22-78 at 9:30 A.M. (Rep: T. Dourian) RICHEY, J.
Mar 01	APPEARANCE of Ricardo Urbina & Theodore Miles as attorneys for the pltfs.
Mar 07	ORDER filed 3-6-78 dismissing defts. Clarence M. Kelley and Griffin B. Bell as parties to this action; adding the Department of Justice as party-deft. to this action. (N) RICHEY, J.
Mar 29	STATUS CALL: Deft. to complete review of documents within 15-days; deft. to file affidavit within 20-days and file motion for summary judgment in 5-days thereafter; motion for summary judgment within 5-days. (Rep. T. Dourian) RICHEY, J.

DATE	PROCEEDINGS

1978

Apr 18 NOTICE by pltf. to take deposition of employees and agents of Deft., Federal Bureau of Investigation.

Apr 18 RESPONSE of defts. to motion of pltf. for enlargement of time.

Apr 18 MOTION of defts. for enlargement of time.

Apr 21 ORDER filed 4-19-78 extending time to & including May 2, 1978 for defts. to file a motion for summary judgment and affidavit. (N) RICHEY, J.

Apr 21 MOTION by defts. for a protective order; P&A.

May 02 MOTION by defts. to dismiss or, in the alternative, for summary judgment; affidavit of Willie E. Stewart; affidavit of Jerry R. Donahue; exhibits A thru M; statement of material facts; memorandum; attachment.

May 5 RESPONSE by pltff. to defts. motion for a protective order; memorandum; attachment 1.

May 16 MOTION of pltf. for enlargement of time to file opposition to motion of deft. for summary judgment or to dismiss; P&A's.

May 31 ORDER filed 5-26-78 granting motion of defts. for a protective order in part; denying motion of defts. for a protective order in part; permitting pltf. to propound interrogatories to be served upon the defts. within 20-days; granting motion of pltfs. for an enlargement of time; allowing pltf. 15-days after defts. answer interrogatories to respond to motion of defts. for summary judgment. (N) RICHEY, J.

June 14 APPEARANCE of Daniel J. Metcalfe and WITHDRAW appearance of Nicki L. Koutsis as counsel for the defts.

June 19 INTERROGATORIES by pltf. to deft. #1.

July 28 ANSWERS by defts. to interrogatories of pltf.

DATE	PROCEEDINGS
1978	
July 28	OBJECTIONS by defts. to interrogatories of pltf.
Aug 11	MOTION by Pltff. to require responsive answers to Pltff's interrogatories; to require defts. to respond to interrogatories objected to by defts; and for leave to file further interrogatories; Memorandum; Exhibit.
Aug 18	MOTION by defts. for enlargement of time to oppose pltff's motion to require responsive answers to pltff's interrogatories; P&A.
Aug 24	ORDER filed Aug. 22, 1978 enlarging time by ten days in which defts. may oppose pltff's motion to require responsive answers to pltff's interrogatories; to require defts. to respond to interrogatories objected to by defts.; and for leave to file further interrogatories. (N) Richey, J.
Sept 05	SUPPLEMENTAL ANSWERS by Deft. #1 to Pltff's Interrogatories.
Sept 05	OPPOSITION by Defts. to Pltff's motion to require responsive answers to Pltff's Interrogatories; to require defts to respond to Interrogatories objected to by Defts; and for leave to file further interrogatories. Exhibit A.
Sept 19	REPLY by pltf. to opposition of defts. to motion of pltf. to require responsive answers to interrogatories of pltfs; to require defts. to respond to interrogatories objected to by defts. and for leave to file further interrogatories.
Nov 14	ORDER filed 11-9-78 granting motion of pltf. to require deft. to provide answer to question IB-1 within 5-days; denying as to questions II-7 through II-14; denying motion of pltf. for leave to file further interrogatories. (N) RICHEY, J.
Nov 14	MOTION of defts. for enlargement of time to comply with Court's order of 11-9-78; P&A's.

DATE	PROCEEDINGS

1978

Nov 21 ORDER filed Nov. 16, 1978 granting defts. motion for enlargement of time; enlarging time to and including 11-22-78 for defts. to comply with the Court's discovery order of 11-9-78. (N) Richey, J.

Nov 22 SUPPLEMENTAL ANSWERS (second) by deft. to interrogatories of pltf.

Dec 12 OPPOSITION of pltf. to motion of defts. to dismiss or, in the alternative, for summary judgment, and motion for interim relief; memorandum; statement of material facts; affidavit of Howard Abramson; attachments 1, 2, & 3.

Dec 22 MOTION by defts. for enlargement of time; P&A's.

1979

Jan 05 MEMORANDUM & Order filed 1-3-79 denying motion of defts. to dismiss and directing pltf. to file a more reasonable description of documents sought in its second request within 10-days of date of this order. (N) RICHEY, J.

Jan 08 ORDER filed 1-5-79 denying motion of defts. for an extension of time to file to opposition of pltf. to motion of deft. to dismiss. (N) RICHEY, J.

Jun 14 STATUS CALL. Further status call set 6-27-79 at 4:00 P.M. (Rep. T. Dourian) Richey, J.

Jul 6 APPEARANCE of Sharon Nelson Abramson as counsel for pltff. CAL/N.

Jul 27 STATUS CALL. Court will approve stipulation re. remaining documents. (Rep. T. Dourian) Richey, J.

Jul 27 DELETION of the names of Theodore Miles and Ricardo Urbina as counsel of record for the pltff. (C. R. blotter)

DATE	PROCEEDINGS

1979

Jul 27 STIPULATION with respect to the remaining documents and requests; directing that motion for summary judgment be filed on any documents remaining in dispute on the first request within 30 days of the 8-3-79 conference and that a response to that motion be filed within 20 days thereafter. APPROVED. (FIAT) (N) Richey, J.

Sept 04 MOTION of defts. for enlargement of time and supporting memorandum.

Sept 06 RENEWED MOTION by defts. for summary judgment; statement; of material facts; P&A's exhibits A thru C; affidavit of Bradley B. Benson; second affidavit of Jerry R. Donahoe; exhibits A thru O to affidavit.

Sept 18 NOTICE of defts. of filing expurgated copies of four document pages at issue; attachment (pages).

Sept 18 MOTION of deft. for extension of time in which to file Federal brief in opposition to pltfs' cross-motion for summary judgment and in reply to pltfs' opposition to defts' motion for summary judgment.

Sept 25 OPPOSITION by pltff. to defts, renewed motion for summary summary judgment and pltff's motion for partial summary judgment, interim relief and in camera relief; memorandum; statement; 2nd affidavit of Howard Abramson w/attachment 1, III & IV-A.

Oct 16 REPLY Memorandum by defts. in further support of defts. motion for summary judgment and in opposition to pltff's motion for partial summary judgment interim relief and in camera relief.

Oct 17 STIPULATION extending time to and including 10-16-79 for deft, to file opposition to pltff's motion for partial summary judgment, interim relief, and *in camera* relief. APPROVED. (signed 10-16-79) (FIAT) Richey, J.

DATE	PROCEEDINGS

1979

Oct 26 REPLY Memorandum by pltff. in further support of pltff's opposition to defts. renewed motion for summary judgment, and pltff's motion for partial summary judgment, interim relief and in camera relief; attachment.

Dec 6 ORDER filed Nov. 30, 1979 granting in part and denying in part defts. motion for summary judgment; granting motion of pltff. for partial summary judgment; denying pltff's motion for interim relief. (N) Richey, J.

Dec 13 NOTICE of Appeal by pltff. from judgment of Nov. 30, 1979; $5.00 filing fee and $65.00 USCA docketing fee paid and credited to the U.S.; copy sent to Daniel J. Metcalfe.

Dec 14 COPY of notice of appeal and docket entries sent to USCA, USCA #79-2500

[EMBLEM]

CONNECTICUT NEWS SERVICE
107 2nd Street, N.E.
Washington, D.C. 20002
(202) 347-3322 (202) 547-9347

June 23, 1976

Mr. Clarence M. Kelley
Director, Federal Bureau of Investigation
Attn: Freedom of Information Act Unit
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20535

Dear Mr. Kelley:

I hereby request the following, under 5 U.S.C. 522 et seq., the Freedom of Information Act:

—Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario.

—Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

If you agree to this request in whole or in part, please supply me with the information if the search and copy fees do not exceed a total of $100. If they do, please inform me of the fees in advance.

If any part of this request is denied, please inform me of your appeal procedures. I will consider my request denied if I have no communication from you within 10 working days of receipt of this letter.

Please be put on notice that I consider this information clearly releasable under the Freedom of Information Act and that I consider any refusal to release this information to be arbitrary and capricious as defined in the act.

All of the people mentioned in this request are, or have been, public officials.

Thanking you, I am

Sincerely,

/s/ Howard Abramson
HOWARD ABRAMSON
Bureau Chief

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Number 77-2206

HOWARD S. ABRAMSON, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL., DEFENDANTS

AFFIDAVIT

I, Jerry R. Donahoe, being duly sworn, hereby depose and say as follows:

I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information—Privacy Acts (FOIPA) Branch, Records Management Division of the FBI, Washington, D.C.

Due to the nature of my official duties, I am familiar with the procedures followed in processing FOIPA requests at FBI Headquarters (FBIHQ) and specifically the processing of documents relating to the plaintiff's request.

* * * * *

II. IDENTIFICATION AND DESCRIPTION OF RECORDS WITHIN THE SCOPE OF PLAINTIFF'S REQUEST

Administrative, applicant, personnel, general and investigative files compiled for law enforcement purposes are maintained in the "FBI Central Records System" of the FBI Records Management Division. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication or foreign intelligence activity. A Central Rec-

ords System enables us to be certain we maintain, in one centralized location, all pertinent information in the possession of the FBI deemed worthy of retention, which has been acquired in the course of fulfilling our investigative responsibilities. Access to this system is afforded by the FBI's General Indices, arranged in alphabetical order, consisting of approximately 60 million index cards on various subject matters, including names of individuals. The index cards fall into two general categories: "main" index cards and "see" (short for "see references" or cross-reference) index cards. A "main" index card bears the name of an individual, organization, activity or the like, which is the main subject of the file contained in the system. A "see" index card bears the name of an individual, organization, activity or the like, which is referred to in, but is not the main subject of, a file maintained in the system. Generally, "see" references contain insufficient background or other information by which a positive identification can be made with a given name. In many instances, receipt of additional identifying information can assist in making a positive identification. Communications originating at FBIHQ and those received from outside the FBI are directed to the Records Management Division at FBIHQ for their entry into the appropriate file of the Central Records System.

The Records Branch of the Records Management Division also uses abstracts to maintain control of and to facilitate retrieval of incoming and outgoing correspondence at FBIHQ. An abstract, as used in this context, is a small card which contains a brief summary of a piece of correspondence including the date of the communication, general subject matter discussed in the communication, the FBIHQ file number to which it applies, and the name of the addressee or correspondent.

The Records Branch utilizes two separate systems of abstracts. One, in which the abstracts are filed numerically by FBIHQ file number, is maintained by the Records

Systems System. The other, maintained by the Records Services Section, has abstracts filed chronologically by date of the communication and alphabetically within each date by the name of the addresses or correspondent.

The abstracts contain only information which is already in the Central Records System, but they provide an additional method of gaining access to individual communications which are located in the Central Records System.

In addition to the systems described above, the FBI has maintained a White House special index at FBIHQ. This index has been used to facilitate security checks on White House appointees, staff members, visitors and guests. The purpose and operation of this index are described in a December 26, 1977, *Report of the Comptroller General of the United States*, entitled "FBI Taking Action to Comply Fully With the Privacy Act." The report explains:

> "When the President is having visitors or guests in or is considering appointments to Government jobs or White House staff the White House security office usually sends their names to the FBI for security checks. If the person has a file, it is reviewed. Any adverse or derogatory information is reported by memorandum to the White House.
>
> "The separate index of persons the White House has an interest in consists of cards with the name, the date the search was made, the type of White House function or position to which appointment was being considered, and the FBI file number, if one exists. Should a search of the general index determine a 'no record,' a card is prepared for the White House special index indicating this. The names of such persons with no record are not included in the general index and thus are not retrievable through the headquarters central records system.
>
> "When the FBI receives a name from the White House, it first searches the special index to see if

the subject was checked previously. If he or she was and the central records system contains information on the subject, the FBI can immediately call for the file. Then it has only to determine whether information has been added to the subject's file since the last request from the White House. If nothing was found in a prior name check performed for the White House, the FBI can limit its search to the time period since the last search."

The FBI does not maintain a separate file system on holders of or candidates for federal elective office. Any information which the FBI has on such individuals is contained in the Central Records System described above.

To locate the information requested by the plaintiff, a search was made of the White House special index, the Central Records System, as well as the system of abstracts maintained by the Records Service Section. As a result of this search, four separate letters from J. Edgar Hoover to John D. Ehrlichman were located, each dated October 6, 1969. The enclosures to these four letters were then located through use of the Central Records System.

* * * * *

/s/ Jerry R. Donahoe
JERRY R. DONAHOE
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and Sworn to before me this 2nd day of May, 1978.

/s/ Mary B. Kircher
Notary Public

My commission expires 9/14/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-2206

HOWARD S. ABRAMSON, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*, DEFENDANTS

SECOND AFFIDAVIT OF JERRY R. DONAHOE

I, Jerry R. Donahoe, being duly sworn, hereby make the following statements based upon information obtained by me personally during the course of my official duties.

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Branch, Records Management Division, FBI, Washington, D. C. I am personally familiar with the documents at issue in the instant Freedom of Information Act (FOIA) lawsuit.

(2) This affidavit supplements and consolidates in one document all that has transpired regarding the handling of plaintiff's FOIA request for the documents at issue herein. The Court's attention is respectfully directed to this affidavit to facilitate the Court's review of the FOIA's exemptions as they have been applied to withhold certain portions of the requested documents. A page-by-page itemization of the requested documents, as well as individual explanatory justifications for the withholding of material from the documents as processed, are also included for the Court's review.

(3) Hereinafter is set forth in chronological order the sequence of the correspondence between plaintiff and the FBI pertinent to the processing of plaintiff's FOIA request.

(4) By letter dated June 23, 1976, to former FBI Director Clarence M. Kelley, plaintiff requested, pursuant to the FOIA, copies of specific communications between the White House and the FBI regarding various individuals listed by plaintiff. (A true copy of this letter is attached hereto and made a part hereof as Exhibit A.)

(5) By letter dated July 23, 1976, former Director Kelley acknowledged receipt of plaintiff's June 23, 1976, FOIA request, but indicated that notarized authorizations from the listed individuals would be required before information regarding the individuals could be released to plaintiff. (A true copy of this letter is attached hereto and made a part hereof as Exhibit B.)

(6) By letter dated August 3, 1976, plaintiff requested, pursuant to the FOIA, records pertaining to White House requests for FBI information about any person who was a candidate for or holder of Federal elective office during any year 1969-1974. (A true copy of this letter is attached hereto and made a part hereof as Exhibit C.)

(7) By letter dated August 20, 1976, former Director Kelley advised plaintiff that the FBI was unable to comply with his request of August 3, 1976, since the records sought were not reasonably described. (A true copy of this letter is attached hereto and made a part hereof as Exhibit D.)

(8) By letter dated September 13, 1976, to Attorney General Edward H. Levi, plaintiff appealed the denial of his August 3, 1976, FOIA request. (A true copy of this letter is attached hereto and made a part hereof as Exhibit E.)

(9) By letter dated September 14, 1976, to Attorney General Edward H. Levi, plaintiff appealed the denial of his June 23, 1976, FOIA request. (A true copy of this letter is attached hereto and made a part hereof as Exhibit F.)

(10) By an undated responding letter, Quinlan J. Shea, Jr., Chief, Freedom of Information and Privacy

Unit, Department of Justice, advised the plaintiff that his administrative appeals would be considered as soon as possible after a necessary administrative delay and that the plaintiff had the right of judicial review. (A true copy of this letter is attached hereto and made a part hereof as Exhibit G.)

(11) By an undated subsequent letter, Rudolph W. Giuliani, Acting Deputy Attorney General, advised the plaintiff that his administrative appeal of his August 3, 1976, request was denied. (A true copy of this letter is attached hereto and made a part hereof as Exhibit H).

(12) By letter dated February 6, 1978, two document pages were referred to Ms. Margaret McKenna, Legal Counsel, White House, Washington, D.C., for processing and release to plaintiff. (A true copy of this letter is attached hereto and made a part hereof as Exhibit I.)

(13) By letter dated March 8, 1978, Allen H. McCreight, Chief, FOIPA Branch, Records Management Division, furnished the plaintiff with 84 pages of documents. (A true copy of this letter is attached hereto and made a part hereof as Exhibit J.)

(14) By letter dated April 3, 1978, Allen H. McCreight furnished the plaintiff with documents which earlier had been referred to two other Government agencies for a determination as to their releasability. (A true copy of this letter is attached hereto and made a part hereof as Exhibit K.)

(15) By letter dated April 17, 1978, Allen H. McCreight advised the plaintiff that the FBI was unable to locate any record to indicate that any documents or information regarding Thomas J. Dodd were transmitted from the FBI to the White House during the years 1969 and 1970. (A true copy of this letter is attached hereto and made a part hereof as Exhibit L.)

(16) By letter dated August 31, 1979, David G. Flanders, Chief, FOIPA Branch, Records Management Division, advised that after further review of the documents, as a matter of administrative discretion, plaintiff was being provided with a release of information on six

document pages which had been previously deleted. (A true copy of this letter is attached hereto and made a part hereof as Exhibit M.)

(17) As regards the FBI file system and the processing of plaintiff's FOIA request, the following description may be of assistance: FBI files are maintained in the FBI Central Records System. A notice describing this system is published at 42 Federal Register 190 (September 30, 1977). The FBI Central Records System consists of one numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication or foreign intelligence activity. Access to this system is afforded by the FBI's General Indices arranged in alphabetical order, consisting of approximately 60 million index cards on various subject matters, including names of individuals. The index cards fall into two general categories: "main" index cards and "see" (short for "see references" or "cross references") index cards. A "main" card carries the name of an individual, organization, activity or the like, which is the main subject of a file contained in the system. A "see" card bears the name of an individual, organization, activity or the like, which is referred to or indexed in, but is not the main subject of, a file maintained in the system. Generally, "see" references contain insufficient information by which a positive identification can be made with a given name. In many instances, receipt of additional information can assist in making positive identification or in locating the file in which the requested information is maintained. Furthermore, it should be noted that the FBI indexes neither all names of individuals contacted nor all information received during an investigation. Only those names and that information which is considered pertinent, relevant and necessary for future retrieval are indexed.

(18) An exhaustive and completely thorough search was undertaken in response to plaintiff's request and the following documents were located in FBI files:

A. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34727, with enclosures, regarding FBI name checks on William J. Harris, J. Keith Mann, Dr. Karl Augustus Menninger, Howard Pyle and Wilbur Hughes Strickland, M.D. Also accompanying the document is a list of names reflecting the name check request from the White House. (Referred to as Document Number 1 in Exhibit N.)

B. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34728, with an enclosure relating to an FBI name check on Archie Floyd Weaver. Also accompanying the document is a letter dated October 2, 1969, reflecting the name check request from the White House. (Referred to as Document Number 2 in Exhibit N.)

C. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 65-5-34736, with enclosures relating to FBI name checks on Cesar Estrada Chavez, Joseph Duffey, Maurice Eisendrath, John Kenneth Galbraith, Richard N. Goodwin, Fannie Lou Hamer, Dr. Reinhold Niebuhr, Paul Schrade, Adam Walinsky and Dr. George Wiley. Also among the enclosures is a copy of an article written by John Kenneth Galbraith, a Vietnam Moritorium Committee Flyer, and a typed list containing the names of certain individuals whose names appeared on the flyer. (Referred to as Document Number 3 in Exhibit N.)

D. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34747, with enclosures relating to FBI name checks on George W. Barton and C. Monroe Shigley. Also accompanying the document is a letter dated October 3, 1969, reflecting the name check request from the White House. (Referred to as Document Number 4 in Exhibit N.)

(A copy of the portions of these documents released is attached hereto and made a part hereof as Exhibit N.)

(19) No documents responsive to plaintiff's request regarding Lowell P. Weicker, Jr., Thomas J. Meskill, Thomas J. Dodd, Alphonsus J. Donohue, John Lupton, Wallace C. Barnes or Emilio Q. Daddario have been located; nor has any signed receipt by the recipient at the White House of the October 6, 1969, letters been located. In addition, written request letters from Mr. Ehrlichman to Mr. Hoover for the data contained in the October 6, 1969, letters were located with respect to only two of the four documents (Documents Number 2 and 4, above).

(20) I have reviewed all of the records described above and have determined that the withheld information contained therein is of the type regularly obtained and maintained by the FBI as part of its investigatory function.

(21) Further, these records reflect in each case that the information was compiled by the FBI in response to a name check request from the White House. Such name check requests are common, and in fact, FBI Headquarters handles thousands of requests for information such as these each day. The requests are received from other Federal agencies as well as from the White House. Those requests from the White House are handled on an expeditious basis with the results often being provided to the White House within twenty-four hours.

* * * * *

(25) From my review of all the records described above, I have thus determined that these records are investigatory records compiled by the FBI for law enforcement purposes within the meaning of 5 USC, Section 552(b)(7).

(26) Moreover, in response to plaintiff's interrogatories, I took the further step of determining the exact origin of each segment of information being withheld from plaintiff in these records pursuant to this law enforcement exemption. In my Second Supplemental Answers to Plaintiff's Interrogatories, sworn to by me on November 22, 1978, I advised that, with the exception

of two specified groups of segments, I had determined that all such withheld information had been originally obtained by the FBI either "in an inquiry regarding an individual being considered for appointment to office," or "to determine if there had been a violation of Federal criminal law and/or to obtain information leading to the arrest and conviction of any person or persons committing any such violation."

(27) With regard to the two groups of segments which I had at that time placed into the "for some other purpose" category, all such material withheld on pages five and forty-seven of Document 3 consists of entirely new administrative notations reflecting upon the characters of the named individuals and thus does not contain information obtained at an earlier time. The release of this information would constitute an unwarranted invasion of personal privacy.

(28) In my Second Supplemental Answers to Plaintiff's Interrogatories, I also placed in the "for some other purpose" category the fourth and fifth deletions on the twenty-fifth page, and all deletions on the twenty-sixth page, of Document 3. I did so because my research at that time did not reveal the exact origin of this information (the withheld portion of which, incidentally, contains no more than an individual's name, as repeated, and his address). Upon an even more exhaustive research of this matter, I still have not been able to determine the exact origin of this information.

(29) All excisions from these documents have been made pursuant to the FOIA, Title 5, USC, Sections 552 (b) (1), (b) (7) (C) and (b) (1) (D). * * *

* * * * *

(30) The following is an itemization of all document pages processed in response to plaintiff's request and an explanation in each instance of the basis for each excision:

* * * * *

C. Document No. 3 is a one-page letter dated October 6, 1969 from the FBI to John D. Ehrlichman, Counsel to the President, which responds to his request for a name check on eleven named individuals. Enclosed with the document are sixty-three pages of name check summary memoranda and attachments pertaining to ten of the eleven named individuals (bringing the total number of pages in Document No. 3 to sixty-four).

The first page of the document has been disclosed without excision.

The second page of the document has been disclosed without excision.

On the third page of the document, five segments of information consisting of or reflecting personal information concerning the activities of the named individual have been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C). Additionally, each of these segments has been excised also pursuant to 5 U.S.C. § 552 (b)(7)(D) to protect the confidential source relationships between the FBI and four law enforcement agencies named in the segments.

The fourth page of the document has been disclosed without excision.

On the fifth page of the document, an administrative notation pertaining entirely to a matter reflecting upon the character of the named individual, including a personal identifier, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C).

On the sixth page of the document, a segment of highly personal information concerning the alleged activities and character of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b)(7)(C). Additionally, this segment has been excised also pursuant to 5 U.S.C. § 552(b)(7)(D) to protect the identity of a confidential source.

The seventh page of the document has been disclosed without excision.

On the eighth page of the document, a segment of highly personal information concerning the alleged activities and character of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C). Additionally, this segment has been excised also pursuant to 5 U.S.C. § 552(b) (7) (D) to protect the identity of a confidential source.

Page nine of the document has been disclosed without excision.

Page ten of the document has been disclosed without excision.

Page eleven of the document has been disclosed without excision.

On page twelve of the document, the first segment of information, consisting of the name of an individual and an identifying description, has been excised to protect that individual, as well as the named individual, from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C). The second segment of information, consisting entirely of personal information reflecting upon the character of the named individual, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

Page thirteen of the document has been disclosed without excision.

On page fourteen of the document, the first segment of information, consisting of the name of an individual and an identifying description, has been excised to protect that individual, as well as the named individual, from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C). The remaining five segments on the page, consisting of the names or portions of the names of two individuals, have been excised to protect those individuals from an unwarranted in-

vasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C). Additionally, these latter segments have been excised also pursuant to 5 U.S.C. § 552(b) (7) (D) to protect the identities of these individuals as confidential sources.

On page fifteen of the document, the names of two individuals, repeated in one instance, have been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C) and also to protect the identities of those individuals as confidential sources pursuant to 5 U.S.C. § 552(b) (7) (D).

On page sixteen of the document, the names of two individuals, repeated in one instance, and including an employment title in a second instance, have been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C) and also to protect the identities of those individuals as confidential sources pursuant to 5 U.S.C. § 552(b) (7) (D).

On page seventeen of the document, the names of three individuals, repeated in two instances, have been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C) and also to protect the identities of those individuals as confidential sources pursuant to 5 U.S.C. § 552(b) (7) (D).

On page eighteen of the document, the name of an individual, repeated in one instance, and including an employment title and address in the first instance, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C) and also to protect the identity of that individual as a confidential source pursuant to 5 U.S.C. § 552(b) (7) (D). Additionally, both the second segment, as well as the concluding five words of the first segment, have been excised pursuant to 5 U.S.C. § 552(b) (7) (D)

because any disclosure of that information, within context, would lead to the identification of that confidential source.

On page nineteen of the document, the name of an individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C) and also to protect the identity of that individual as a confidential source pursuant to 5 U.S.C. § 552(b)(7)(D). The other segments containing personal information reflecting upon the alleged activities and character of another individual, whose name is also withheld, have been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C). Additionally, these segments have been excised also pursuant to 5 U.S.C. § 552(b)(7)(D) to protect the identity of a confidential source.

On page twenty of the document, two segments of information at the top of the page consisting entirely of information provided by two confidential sources, as well as reflecting upon the alleged character of the named individual, have been excised to protect the named individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C) and also to protect the identities of the two confidential sources pursuant to 5 U.S.C. § 552(b)(7)(D). The third segment, consisting of the names of two individuals and their common address, has been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C) and also to protect those individuals as confidential sources pursuant to 5 U.S.C. § 552(b)(7)(D). At the bottom of the page, the name of an individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b)(7)(C).

Page twenty-one of the document has been released without excision.

Page twenty-two of the document has been released without excision.

Pages twenty-two-a, twenty-two-b, in their entireties as well as almost all of page twenty-three of the document, consisting entirely of information provided by several distinct confidential sources reflecting upon the alleged character of the named individual or, for the most part, upon the alleged activities and character of a second individual whose name is also withheld, have been excised to protect both individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C) and also to protect the identities of the confidential sources pursuant to 5 U.S.C. § 552(b) (7) (D).

On page twenty-four of the document, an address of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

On page twenty-five of the document, the names of two individuals, repeated in three instances, and in two instances including addresses, have been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C) and also to protect the identities of those individuals as confidential sources pursuant to 5 U.S.C. § 552(b) (7) (D).

On page twenty-six of the document, the name of an individual has been excised in six instances to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C) and also to protect the identity of that individual as a confidential source pursuant to 5 U.S.C. § 552(b) (7) (D).

Page twenty-seven of the document has been disclosed without excision.

Page twenty-eight of the document has been disclosed without excision.

Page twenty-nine of the document has been disclosed without excision.

On page thirty of the document, an address of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

On page thirty-one of the document, the names of three individuals have been excised to protect those individuals from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C) and also to protect the identities of those individuals as confidenial sources pursuant to 5 U.S.C. § 552(b) (7) (D).

Page thirty-two of the document has been disclosed without excision.

On page thirty-three of the document, an address of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

On page thirty-four of the document, the first two segments of information have been excised pursuant to 5 U.S.C. § 552(b) (7) (D) to protect the confidential source relationships between the FBI and the two law enforcement agencies named in the segments. The third segment of information, consisting of an address of the named individual, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

Page thirty-five of the document has been disclosed without excision.

On page thirty-six of the document, an address of the named individual has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

Page thirty-seven of the document has been disclosed without excision.

Page thirty-eight of the document has been disclosed without excision.

Page thirty-nine of the document has been disclosed without excision.

On page forty of the document, two segments of information have been excised pursuant to 5 U.S.C. § 552 (b) (7) (D) to protect the confidential source relationships between the FBI and two law enforcement agencies named in the segments.

Page forty-one of the document has been disclosed without excision.

Page forty-two of the document has been disclosed without excision.

On pages forty-three and forty-four of the documents, six paragraphs of information have been excised pursuant to 5 U.S.C. § 552(b) (1) because they are currently classified in accordance with Executive Order 12065, at the level "Secret," as described and attested to in the affidavit of FBI Special Agent Bradley B. Benson, submitted herewith.

Page forty-five of the document has been disclosed without excision.

Page forty-six of the document has been disclosed without excision.

On page forty-seven of the document, an administrative notation pertaining entirely to a matter reflecting upon the character of the named individual, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552 (b) (7) (C).

On page forty-eight of the document, the first segment of information, consisting entirely of personal information reflecting upon the character of the named individual, has been excised to protect that individual from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C). The second segment of information, consisting entirely of highly personal information pertaining to a relative of the named individual, has been excised to protect that individual as well as the named individual, from an unwarranted invasion of personal privacy pursuant to 5 U.S.C. § 552(b) (7) (C).

On page forty-nine and fifty of the document, a total of two paragraphs of information have been excised pursuant to 5 U.S.C. § 552(b)(1) because they are currently classified in accordance with Executive Order 12065, at the level "Secret," as described and attested to in the affidavit of FBI Special Agent Bradley B. Benson, submitted herewith.

Page fifty-one of the document has been disclosed without excision.

Page fifty-two of the document has been disclosed without excision.

Page fifty-three of the document has been disclosed without excision.

Page fifty-four of the document has been disclosed without excision.

Page fifty-five of the document has been disclosed without excision.

Page fifty-six of the document has been disclosed without excision.

Page fifty-seven of the document has been disclosed without excision.

Page fifty-eight of the document has been disclosed without excision.

Page fifty-nine of the document has been disclosed without excision.

Page sixty of the document has been disclosed without excision.

Page sixty-one of the document has been disclosed without excision.

Page sixty-two of the document has been disclosed without excision.

* * * * *

/s/ Jerry R. Donahoe
JERRY R. DONAHOE
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and Sworn to before me this 6th day of September, 1979.

/s/ Lee Ann Doleslagle
Notary Public

My commission expires April 30, 1984

DOCUMENT No. 3

October 6, 1969
BY LIAISON

Honorable John D. Ehrlichman
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Ehrlichman:

Reference is made to your name check request concerning Cesar Estrada Chavez and some other individuals.

Attached are separate memoranda concerning the following individuals:

Cesar Estrada Chavez
Joseph Duffey
Maurice Eisendrath
John Kenneth Galbraith
Richard N. Goodwin
Fannie Lou Hamer
Dr. Reinhold Niebuhr
Paul Schrade
Dr. Benjamin M. Spock
Adam Walinsky
Dr. George Wiley

This letter of transmittal may be declassified when it is removed from the enclosures bearing a classification.

Sincerely yours,

J. EDGAR HOOVER

~~CONFIDENTIAL~~

October 6, 1969

JOSEPH DUFFEY Summary

Joseph Duffey has not been the subject of an investigation conducted by the FBI.

The central files of this Bureau disclose one Joseph Duffey, also spelled Duffy, of the Hartford Seminary Foundation has been active in Vietnam protest matters in the past. Among the groups with which he has been associated are "Inter-University Committee for a Public Hearing on Vietnam," "Negotiation Now," and "Hartford Committee for Peace in Vietnam." This same individual was reliably reported [redacted]

It is not known if the above information pertains to the subject of this name check request.

The fingerprint files of the Identification Division of the FBI contain no arrest data identifiable with captioned individual based upon background information submitted in connection with this name check request.

NOTE: Per request of John D. Ehrlichman, Counsel to the President. Memorandum classified Confidential as it contains information extracted from other communications bearing that classification.

DECLASSIFIED BY 6616
ON 2-6-78
JEB/ROB

HRH:rog
(7)

~~CONFIDENTIAL~~

MAIL ROOM ☐ TELETYPE UNIT ☐

October 6, 1969

JOHN KENNETH GALBRAITH Summary

Mr. John Kenneth Galbraith, who was born on October 15, 1908, at Iona Station, Ontario, Canada, and who became a naturalized citizen of the United States on September 13, 1937, was the subject of investigations conducted by the FBI in 1941, 1950, 1961 and 1965. The results of these investigations were furnished the White House by communications dated March 6, 1961, January 19, 1965, and February 4, 1965, copies of which are attached.

The fingerprint files of the Identification Division of the FBI contain no arrest data identifiable with captioned individual based upon background information submitted in connection with this name check request.

Enclosures (3)

NOTE: Per request of John D. Ehrlichman, Counsel to the President.

JMM:paa
(7)

DEC 89

161-302-95

9

The New York Times, Sunday, September 28, 1969

On Oct. 15th, students and faculty all over America will leave their classes for 1 day to ring doorbells and talk to their fellow Americans about the madness of Vietnam.

WE SUPPORT OCT. 15

SEN. CHARLES E. GOODELL

"Once again the students of this nation will go door to door to call for peace in Vietnam.
Their constructive expression of indignation over this senseless war is truly a high form of patriotism."

SEN. MARK O. HATFIELD

"The type of nonviolent action which the Moratorium asserts is not only highly commendable but also sorely needed."

SEN. EUGENE J. McCARTHY

"The Vietnam Moratorium is the most significant demonstration of opposition to the war in Vietnam since the primary results of 1968. It is the only way that the people of the country can demonstrate a second judgment on the war in Vietnam to those who hold political power

DR. JOHN KENNETH GALBRAITH

"Everyone who has been lecturing students on the wickedness of violence should welcome this opportunity to reassert peacefully their opposition to the continued pressure from the military leadership."

RICHARD N. GOODWIN

"This Moratorium is an unusual opportunity for those of us who believe that public policy can be made to yield to citizen action without violence or coercion. It opposes the superior moral force of peace to the alluring insanity of war."

FANNIE LOU HAMER

"With the kind of pain we are undergoing here in Mississippi, to have black and white men dying in Vietnam is a shame and disgrace. It is essential that we support the Moratorium."

* * * * *

DR. REINHOLD NIEBUHR

"Let us all support the students who are trying to stop, by their Moratorium, this disastrous, costly and pointless war."

PAUL SCHRADE

United Auto Workers, Western Director
"On October 15th, the American people will have a chance to make President Nixon stop the killing and end this immoral war."

BENJAMIN SPOCK, M.D.

"Only public pressure for immediate withdrawal will persuade Nixon to end the war. The Vietnam Moratorium will help build that pressure."

ADAM WALINSKY

"By the awful grace of God, we are the survivors. Others have given their lives for us—in Vietnam, and here in America. On October 15th, we begin to pay our debts."

GEORGE WILEY

Executive Director, National
Welfare Rights Organization
"Ours is a government that has imposed immense suffering on poor people in Vietnam and poor people in this country. On October 15th, we must demonstrate, dramatically and directly, our outrage against these policies and our commitment to change the nation's priorities."

SEN. GEORGE McGOVERN

"I would hope that the Moratorium observance will make clear to the Administration that in the continuance of this senseless bloodshed lies the seed of national tragedy. It is an effort which merits the responsible participation of all Americans who are anxious to reverse a policy of military attrition and moral disaster."

CESAR CHAVEZ

"There is no chance of achieving full participation for all of our citizens in our own system here in America so long as our government is preoccupied with interfering in the affairs and aspirations of other poor people around the world. I therefore hope that all Americans will join in and support the activities of the Vietnam Moratorium Committee."

JOSEPH DUFFEY

Chairman, Americans for Democratic Action
"The moral, physical and economic health of America depends upon an end to the war this year, not next year or the year after. A.D.A. urges its members and local chapters to give full support to the Vietnam Moratorium."

RABBI MAURICE EISENDRATH

"To save one life is to save the world, but to stand idly by the blood of one brother [sic] is to destroy the world."

This is where you come in. We ask your support. We ask you to put aside "business as usual" on Oct. 15, and devote the day to organize your co-workers and neighbors to work actively for an early withdrawal of all our troops from Vietnam.

Vietnam Moratorium Committee
1029 Vermont Avenue, N.W.
Washington, D.C. 20005 Tel: 202-347-4757

☐ I know you need money.

Enclosed is my contribution of:

☐ $100 ☐ $50 ☐ $25 ☐ $10 ☐ $5 $——

☐ Please send me —— literature kits for the Vietnam

• • •

Name ——————————————————

Address ——————————————————

City ——————— State ——————— Zip ———

Make checks payable to:

Vietnam Moratorium Committee

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOWARD S. ABRAMSON, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL., DEFENDANTS

2nd AFFIDAVIT OF HOWARD ABRAMSON

My name is Howard Abramson and I am the plaintiff in this matter. I am, and have been for most of my adult life, a professional journalist and writer. I present this affidavit as my FOIA request nears the age of 40 months. This affidavit is in addition to an earlier affidavit of mine, which is appended as Attachment 1.

2) Until this litigation was begun by me, and at my personal expense, defendants refused to provide me with any documents at all under the FOIA. Now that some documents have been obtained by me, by arrangement between the parties and as ordered by this Court, I have been able to more precisely determine which documents fall within my request. And I have been able, after review of the provided material, to better determine which documents I believe withstand the test of the public's right to know, versus the privacy considerations of the targeted individuals.

3) After defendants provided the 84 pages of documents, I immediately began, with the assistance of counsel, to pare the list of documents to be pursued. I determined that I would not press defendants to provide all the documents and am pressing only my rights to material deleted from Document 3.

4) I publicly stated that I would not pursue 7(D) material, as included footnote 1 of plaintiff's opposition to defendants' last motion to dismiss. Thus, defendants

continued and time-consuming arguments in opposition to my right to obtain 7(D) material is a bit baffling to me.

5) The issues in the pending request are simple. There were four batches of "name check requests" sent on that one day in October, 1969, from the FBI to the White House, according to the FBI. We have narrowed our pursuit to Document 3, the FBI memos concerning 11 prominent Americans. Of those 11 individuals, we are now seeking the deleted information within those documents on nine of them, ranging in length from one sentence, to one completely missing memorandum. In most cases, the deleted material in question runs no longer than a few paragraphs.

6) Thus we are seeking the court's review of our demands for information deleted on parts of four pages by defendants under (b)(1) claimed exemptions, and parts of approximately 12 pages under 7(C).

7) In one instance, however, (that involving Dr. Benjamin M. Spock) the FBI has failed to produce any information even though the transmittal letter from Hoover to Ehrlichman (Pg. 1 of Document 3) clearly states that "separate memoranda concerning the following individuals," including Dr. Spock, were attached. Defendants have also failed to produce two full pages within the material transmitted from the FBI to the White House on John Kenneth Galbraith.

8) Defendants have failed to produce any form of communication from the White House requesting such "name check requests" from defendant FBI in two of the four cases, including Document 3, as stated in the second Donohue affidavit.

9) The "name check requests" still under contention at this point do not concern 11 Jane and John Does. To the contrary, this White House "name check request" concerns truly prominent Americans. The 11 persons in question are:

—Cesar Estrada Chavez: The most prominent farm workers union organizer in America who, at the time of the request, was leading the nationwide boycott of table grapes. Chavez was a frequent topic of network television broadcasts and newspapers and magazine articles at the time.

—Joseph D. Duffey: Currently the executive director of the National Commission on the Humanities, he has also served the Carter Administration as an assistant secretary of State and was, at the time of the request, a candidate for the Democratic party's nomination for a U.S. Senate seat from Connecticut.

—Maurice N. Eisendrath: A New York City rabbi who was, at the time, president of the Union of American Hebrew Congregations, an organization of 700 Reform Jewish congregations, a loud social critic and frequent protestor of the war in Vietnam under Presidents Johnson and Nixon.

—John K. Galbraith: The most prominent American economist then and now, author of myriad books and magazine articles, frequent federal employe, Harvard professor, former U.S. Ambassador to India, and consultant to the Kennedy White House.

—Richard N. Goodwin: Former clerk to Supreme Court Justice Felix Frankfurter who held various positions in the Kennedy White House, including assistant special counsel to the President, and who was special assistant to President Johnson.

—Fannie Lou Hamer: A leading black activist during the 1960s, who became the leading spokesman in the deep South, even though she was 45 years old before entering the civil rights arena. She delivered a landmark speech at the 1964 Democratic National Convention in a battle over the seating of rival convention delegates from her

state of Mississippi. Mrs. Hamer died in March, 1977, at the age of 60.

—Dr. Reinhold Niebuhr: A longtime political and socialist political activist. At the time of the White House request, Dr. Niebuhr was 77, and clearly in failing health. In 1968 he resigned a high position with the New York State Liberal Party because of failing health.

—Paul Schrade: Prominent liberal Democrat, former co-chairman of the New Democratic Coalition, he was a high-ranking official of Sen. Robert Kennedy's bid for the presidency in 1968 and was shot in the head during the assassination of Sen. Kennedy. At the time of the request, he was a regional director for the United Auto Workers.

—Dr. Benjamin Spock: America's most noted child psychologist, author of best-selling childrens' books, and frequent social and political critic.

—Adam Walinsky: Former aide to Sen. Robert Kennedy, a New York lawyer who sought the 1970 Democratic party nomination for attorney general of New York State. By the time of the name check request, he was being widely mentioned in the media as a candidate.

—Dr. George Wiley: A Ph.d in chemistry and former professor at Syracuse University, Dr. Wiley later became one of the principals of the Congress of Racial Equality (CORE) and later founded an organization of welfare recipients. He died in a boating accident in 1973.

10) At least some of the 11 individuals were surely known to Ehrlichman and others at the White House. The 11 individuals certainly represented no physical threat to the President or other heads of state.

11) I would like to again assure the Court that my objective is not to publish embarrassing personal details about the lives of certain individuals: nor is it to harrass defendants.

12) I believe that my true objective—the public dissemination of any illegal and or unethical activities on the part of the government, for the benefit of the future more than the history of the past—are totally consistent with the avowed goals of the FOIA. And I again respectfully ask this Court to assist me in carrying out my chosen purpose.

13) I have read the contents of this affidavit and swear that they are true to the best of my knowledge.

/s/ Howard Abramson
HOWARD ABRAMSON

Sworn and Subscribed to before me this 25th day of September, 1979.

/s/ GILBERT C. VINCENT, D.P.
Notary Public

My commission expires: 4/30/81

SUPREME COURT OF THE UNITED STATES

No. 80-1735

FEDERAL BUREAU OF INVESTIGATION, ET AL., PETITIONERS

v.

HOWARD S. ABRAMSON

ORDER ALLOWING CERTIORARI
Filed June 15, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. Justice Powell took no part in the consideration or decision of this petition.

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No. 80-1735

In The

Supreme Court of the United States

October Term, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the government may convert information originally acquired for law enforcement purposes into new documents for clearly non-law enforcement purposes and still have such information exempted from disclosure pursuant to Exemption 7 of the Freedom of Information Act.

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HOWARD S. ABRAMSON, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

This action arose when Howard S. Abramson, the Respondent, as a professional journalist, learned of an instance in which information regarding a politician in Connecticut, then a candidate for the U.S. Senate, had been provided to the White House by the FBI. The partially obscured copy (which he had obtained from a non-governmental source) of the FBI cover memorandum transmitting the information did not indicate any purpose, but merely referred to an antecedent White House request.

The Respondent questioned what legal justification could enable the White House to be able to direct the FBI to investigate and turn over its "secret" information about the individual in question. (The FBI's memorandum carried a "secret" classification.) Further, the individual's political leanings made it obvious that he could not possibly have been considered for any political appointment in that administration.

In an effort to ascertain what legal authorization and mechanism the White House used to obtain the information, what information was actually conveyed to the White House, and what uses the White House made of the information, Respondent, in June, 1976, filed a request under the Freedom of Information Act, 5 U.S.C. 552 (hereinafter "FOIA" or "Act").

Petitioners had categorically and continually denied any and all liability under the FOIA, both during the administrative appeal procedures and in its answer to Respondent's suit.

Petitioners forced Respondent to exhaust his administrative remedies, hire legal counsel, file his suit in this matter, and actually walk into the courtroom before they were willing to even focus on Respondent's request and admit the existence of a colorable claim under the Act.

Petitioners then granted Respondent access to a substantial number of documents. Petitioners, however, expurgated parts of the documents, claiming they were exempted pursuant to Sections b(7)(C) and (D) and b(1). (The material expurgated pursuant to Exemptions b(1) and b(7)(D) is no longer at issue.)

The document at issue (referred to as document 3) contains information requested and transmitted to the White

House concerning eleven prominent individuals who had vocalized political views contrary to those of the President.[1]

It appears that the White House ripped a full page protest ad in the New York Times that the eleven individuals had signed, and forwarded that ad to the FBI with the request that it investigate these individuals and transmit its findings to the White House. The document at issue is comprised of the information compiled by the FBI in compliance with that White House request.

Both the lower courts have found that the document in question was compiled for partisan political – and not law enforcement – purposes and is thus not exempt from disclosure under the Act.

Petitioners argued that even though the document in question was not compiled for law enforcement purposes, the information contained in the document had originally been obtained for law enforcement purposes, and thus met the threshold requirement of Exemption b(7). The FBI thus argued that it must be able to transmit highly confidential information (including names of informants[2] and information which would constitute an unwarranted invasion of personal privacy) from its own law enforcement files for non-law enforcement purposes, without regard to the legal requirements of the FOIA.

But the Court of Appeals for the District of Columbia held:

> "However, the statutory scheme of the FOIA very clearly indicates that exemptions from

[1]Petitioners' Appendix at page 10A.

[2]Respondent has continually reasserted that he does not want the names of informants.

> disclosure apply only to documents, and not to the use of the information contained in such documents. Thus when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA."[3]

The Court then reaffirmed that the government had failed to qualify for Exemption 7 and required that the document be disclosed.

> ". . . the Government has failed to demonstrate that the "name check" summaries were compiled for law enforcement purposes, and [we] accordingly find that the recompiled summary documents have been improperly withheld."[4]

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly interpreted and applied Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7).

---

[3]Petitioner's Appendix at 15A.

[4]Ibid at 18A.

The Court of Appeals also held that if the attachments were photocopies of original FBI documents which had been compiled for law enforcement purposes, such documents could be exempt from disclosure.

That holding is dictum, as all the attachments have been released. Although Petitioners fail to disclose that fact, their own description of the Attachments makes it clear that they are public documents and could not be in dispute. On page 5 of their petition they describe the attachments as:

". . . a copy of an article written by one of the individuals, a Vietnam Moratorium Committee flyer, and a typed list of the individuals whose names appear on the flyer."

The statutory structure of the Act is clear. Congress determined that information should be withheld from the public only under certain limited conditions. The public has a right to know what kind of information the government is compiling for purposes other than those specifically exempted. And only through such disclosure can the citizenry determine whether they approve of such uses.

The petitioners are arguing that the exempted uses of information should be expanded to any use of their choosing, and without public scrutiny, as long as the information being disseminated was originally compiled for any law enforcement purposes. And while we also question the specific non-law enforcement purposes for which petitioners argue the confidential right to disseminate such information,[5] the act is clear that such argument must be made before Congress, and not the courts.

---

[5]In addition to the uses Petitioners note on page 16 of their petition for which they must be able to use such highly confidential information (some of which may arguably be law enforcement purposes), they also argued in "Appellees Petition for Rehearing and Suggestion for Rehearing En Banc" at page 12, that the FBI must be able to use such information for various management or administrative purposes such as audits, budget considerations, or Congressional oversight and review.

We are outraged at petitioner's dissemination of informants' names and highly confidential personal information for these purposes.

Information used for the purposes claimed necessary by Petitioners may, in fact, be exempt under Exemption 6 in any event. Petitioners' purposes could be adequately satisfied with summaries either omitting any personal identifiers, or only categorizing the specific information. And, of course, removing the personal identifiers would moot petitioners' need to raise Exemptions 6 or 7 with respect to such documents. Further, such documents may be exempt from disclosure under other provisions of the Act or other statutes of Congress.

The structure of the Act demonstrates Congress' concern about the balance between the public's right to know the information used by the government and the individual's right to privacy. Congress determined that such balancing would have to be done on a case-by-case basis and, pursuant to Exemptions 6* and 7, authorized the courts to make such a balance. Although it appears that Exemption 6 would cover all cases where an individual's privacy was in question, its balancing test requires the government not only to demonstrate that the disclosure of the information would constitute an unwarranted invasion of personal privacy, as required by Exemption 7, but also that such invasion was "clearly" unwarranted.

However, Congress did not even authorize the courts to weigh the individual's rights against the public's in every instance. Congress determined that the public's right to know in cases where the information did not meet the threshold requirements of the exemptions, was – as in this case before the Bench – automatically greater than the individual's rights to privacy. (The threshold requirement of Exemption 7 is that the record in question must have been compiled for law enforcement purposes.)

The Court of Appeals correctly applied the language of the Act and found that since the document in question had not been compiled for law enforcement purposes, it could not be exempt from disclosure under Exemption 7.

If, however, the Court determines to grant certiorari in this case, the question presented should be:

Whether the government may convert information originally acquired for law enforcement purposes into

*Petitioners did not raise Exemption 6 in this case.

new documents for clearly non-law enforcement purposes and still have such information exempted from disclosure pursuant to Exemption 7 of the Freedom of Information Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SHARON T. NELSON
Attorney for Respondent

May 1981

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No. 80-1735

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether information contained in investigatory records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of the Freedom of Information Act loses its exempt status when it is incorporated into records compiled for purposes other than law enforcement.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not yet reported. The orders of the district court (Pet. App. 26a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and a petition for rehearing was denied on December 19, 1980 (Pet. App. 23a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 17, 1981. The petition was filed on April 16, 1981, and was granted

on June 15, 1981 (J.A. 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(7) of the Freedom of Information Act, 5 U.S.C. 552(b)(7), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforce-

ment authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

3. The unnumbered provision following Subsection (b)(9) of the Freedom of Information Act, 5 U.S.C. 552(b)(9), provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

1. On June 23, 1976, respondent Howard S. Abramson filed a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking the following documents from the Federal Bureau of Investigation (J.A. 7-8):

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;
>
> —Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

This request was denied on the grounds that, absent disclosure authorization from the individuals named in the request, the information came within Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. 552(b)(6) and (b)(7)(C), protecting, respectively, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * constitute an unwarranted invasion of personal privacy" (Pet. App. 5a). On August 3, 1976, Abramson filed a new and broader request that was couched in more general terms and did not include the names of specific individuals. This request was denied on the grounds that it did not reasonably describe the records sought (*id.* at 5a-6a).

On December 20, 1977, after exhausting his administrative appeals, Abramson brought this action in the United States District Court for the District of Columbia to enjoin the FBI from withholding the requested records (Pet. App. 7a). The government's answer denied that Abramson was entitled to any

relief, but, while the suit was pending, the FBI reprocessed Abramson's request and provided more than 80 pages of material, with deletions of information that the government asserted came within Exemptions 1, 7(C), and 7(D) of the Act, 5 U.S.C. 552 (b)(1), (b)(7)(C), and (b)(7)(D) (*ibid.*).[1] Those pages comprised four groups of records consisting of four separate cover letters with attached materials pertaining to individuals named in the cover letters. Each letter was from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to President Richard M. Nixon, and each was dated October 6, 1969 (Pet. App. 9a n.12).

The four groups of records were designated "Documents 1, 2, 3, and 4" (Pet. App. 9a-10a n.12). The information at issue here constitutes portions of pages within Document 3, which consists of (i) a cover letter from Hoover to Ehrlichman listing the names of 11 individuals about whom "name check" requests had been made, (ii) summaries of FBI file information on 10 of the 11 individuals (and, in some cases, attached documents, primarily copies of summaries that had been provided in response to requests from earlier administrations), (iii) a copy of an article written by one of the individuals, (iv) an

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[1] Exemption 1 covers properly classified national defense or foreign policy information. Exemption 7(D) covers "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *." These exemption claims are no longer at issue in this case (Pet. App. 3a n.5).

advertisement in the *New York Times* prepared by the Vietnam Moratorium Committee, and (v) a typed list of the individuals whose names appear in the advertisement (*id.* at 9a n.12).

In an affidavit dated May 2, 1978, FBI Agent Jerry R. Donahoe explained (J.A. 11-12) that the FBI periodically received name check requests from the White House regarding persons being considered for federal appointment or persons who would be attending White House functions and for whom a security check was thus necessary. (As Agent Donahoe noted in a later affidavit (J.A. 18), similar requests were also received from other federal agencies.) When receiving a name check request from the White House, the FBI would search its files and assemble the records it possessed on the individual and would then extract pertinent information from those records and submit a memorandum to the White House (J.A. 11-12). As the released portions of Document 3 indicate (see, *e.g.*, J.A. 31), the FBI would in some instances simply summarize its information in a single name check summary. If it possessed a summary prepared in response to a previous White House request concerning the individual, however, it would attach that summary to the new summary (see, *e.g.*, J.A. 32).[2]

The government filed a motion to dismiss or in the alternative for summary judgment on the basis of its exemption claims and supporting affidavits. The dis-

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[2] Even when the FBI had undertaken no previous investigation of the subject of the name check request, its records of investigations of other persons sometimes contained information about that individual. The FBI was able to locate such information in its Central Records System through a cross-reference index (known as "see references") (J.A. 10).

trict court denied the motion, holding (Pet. App. 32a-34a), *inter alia*, that the Exemption 7 claims had not been substantiated because the government had not shown that the documents at issue were investigatory records "compiled for law enforcement purposes." The government thereafter submitted a renewed motion for summary judgment supported by a second affidavit by Agent Donahoe, in which he traced the deleted segments of information to their origins in FBI investigatory files. In this affidavit Agent Donahoe stated (J.A. 18-19) that virtually all the deleted segments were taken from records compiled either as part of a criminal investigation or in response to an inquiry for information concerning an individual under consideration for a government appointment. The affidavit did not give the reasons the White House had requested information on the 11 individuals described in the Document 3 summaries, but it again explained generally the FBI's statutory responsibility for providing name check information to aid in the determination of the suitability of candidates for federal office and in assuring the security of the President and of foreign visitors to the White House (J.A. 18; C.A. App. 27-29).[3]

Based on the Donahoe affidavits, the government contended that the deletions from Document 3 were exempt from disclosure under Exemption 7(C) of the FOIA. In arguing that the threshold showing of "law enforcement purposes" had been established, the government contended that the FBI was fulfilling a law enforcement function in responding to White House name check requests. The government also argued that, in any event, this requirement was met by the

[3] "C.A. App." refers to the joint appendix filed in the court of appeals.

affidavit tracing the deleted segments to their origin in records unquestionably compiled for law enforcement purposes.

The district court rejected the government's argument that, in responding to the 1969 White House request, the FBI was generating investigatory records compiled for "law enforcement purposes" rather than records compiled for possible "political purposes" (Pet. App. 26a-27a). It noted in this connection that each of the 11 individuals about whom the White House had sought information had been "prominently associated with liberal causes and/or [had] been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time" (*id.* at 27a). The court observed, however, that the government had contended "that certain materials compiled for enforcement purposes are exempt from disclosure pursuant to exemption (7)(C) because disclosure would constitute an unwarranted invasion of personal privacy," and it held that the government had "validly invoked this exemption" (*ibid.*).

2. Respondent Abramson appealed the district court's ruling on the Exemption 7(C) claims (Pet. App. 11a & n.14), and the court of appeals reversed (*id.* at 1a-22a).

In the court of appeals, the government defended the district court's order on the ground that it correctly distinguished between the compilation of summaries in response to the 1969 White House request, a request as to which the district court found no evidence of law enforcement purposes, and the original compilations of the segments of deleted privacy information, which were identified in Agent Donahoe's second affidavit as having been undertaken for specific law enforcement purposes. The court of ap-

peals concluded, however (Pet. App. 13a-14a), that the district court had made two inconsistent rulings: (i) that the Document 3 records were not compiled for law enforcement purposes and (ii) that, nevertheless, information in those records was protected from disclosure by Exemption 7(C).

The court of appeals was willing to accept, for the purposes of its decision, that the government had established that the deleted information in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes' " (Pet. App. 14a). Furthermore, the court of appeals did not suggest any disagreement with the district court's finding that disclosure of this information would constitute an unwarranted invasion of personal privacy. Nonetheless, the court below held (*id.* at 14a-15a) that the deleted segments were outside the protection of Exemption 7(C) because the government had failed to show that the name check summaries themselves were compiled for law enforcement purposes or that the summary pages were "duplicates of any FBI investigatory documents * * * compiled for legitimate law enforcement purposes." The court construed "the statutory scheme of the FOIA" as indicating that "exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents" (*id.* at 15a; emphasis in original; footnote omitted). It added (*ibid.*): "Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA." The court accordingly rejected what it characterized as the government's " 'pass through' theory" and held that "the recompiled summary documents have been improperly withheld" (*id.* at 18a).

The court of appeals noted, however, that records comprising Document 3 consisted of both name check summaries and "attachments" and that the district court had not, in making its threshold Exemption 7 determination respecting the purposes of the record compilations, made a separate inquiry as to the attachments (Pet. App. 18a-19a). Because the court of appeals found itself "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created," it remanded the case to the district court "for a finding on the issue of whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original; footnote omitted). Only if the "original documents were sent to the White House as initially compiled and without *any* modification" would the information contained in those documents be entitled to the protection of Exemption 7 (*id.* at 21a; emphasis added).

The government's petition for rehearing, with suggestion for rehearing en banc, was denied, two judges dissenting (Pet. App. 24a-25a).

SUMMARY OF ARGUMENT

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), protects from mandatory disclosure "matters that are * * * investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * constitute an unwarranted invasion of

personal privacy." The court of appeals has held that information that is collected by an agency for law enforcement purposes and that meets the criteria of Exemption 7(C) loses its exempt status if it is later incorporated into a document compiled for purposes other than law enforcement. This holding rests on a simplistic distinction between "documents" and "information" that is inconsistent with the legislative history of Exemption 7 and that subverts the purposes of the exemption without serving the larger disclosure goal of the Act.

1. Congress amended Exemption 7 in 1974 because courts had inflexibly construed the exemption in its original form so as to permit the government to withhold any material compiled for law enforcement purposes so long as it was located in an agency's "investigatory files." The amendment changed the reference from "investigatory files" to "investigatory records" and described six specific harms to law enforcement or private party interests, in order to make disclosure turn on the *reasons* for withholding information rather than the *location* of that information. In the debates on the amendment to Exemption 7, members of Congress used interchangeably such terms as "documents," "records," "matters" and "information." The term "records," therefore, can hardly have the talismanic significance accorded it by the court of appeals. Congress also added a new provision requiring the government to disclose any "reasonably segregable portion" of a record, thereby again indicating that documents were not to be treated as indivisible units for exemption purposes but that distinctions were to be made among their parts.

Although the court of appeals implicitly acknowledged that the making of an exact duplicate of a *document* compiled for law enforcement purposes does not constitute a recompilation of the document that would require a determination concerning the purposes of the duplication, it effectively held that duplication of the *information* in a record compiled for law enforcement purposes does constitute such a recompilation. By thus resurrecting this document/information distinction, the decision below effectively disregards Congress' intent in amending Exemption 7 and adding the segregability provision, both of which require a focus on the *content* of a document rather than the details of its physical creation or location.

2. The central purpose of the FOIA is "to ensure an informed citizenry" in matters important to the functioning of the democratic process. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress recognized, however, that the disclosure requirements of the Act had to be subject to particular exemptions in order to protect legitimate governmental and private interests that could be harmed by release to the public of certain types of information. In applying the provisions of the FOIA in a particular case, a court should seek to accommodate both the general disclosure purposes of the statute and the purposes served by the specific exemptions. The court of appeals' decision in this case frustrates the congressional intent reflected in Exemption 7(C) to protect personal information concerning individuals collected in law enforcement records, without noticeably advancing the philosophy of open government embodied in the statute.

Respondent assertedly made his FOIA request in order to determine if the White House had attempted

to make improper political use of FBI files. The documents released by the FBI as a result reveal the fact of the White House request for FBI files on named individuals and the positive FBI response to that request. Disclosure of details concerning the personal lives of those on whom the White House sought information would in no way advance any public interest objective, but it would invade the personal privacy of those individuals. Indeed, the lack of any rational relationship between the court of appeals' theory and the disclosure purposes of the Act is indicated by the court's decision to remand the case as to certain "attachments" to "name check" summaries provided by the FBI for a determination whether they were mere copies of FBI investigatory records compiled for law enforcement purposes. The court would not require disclosure of exempt material contained in any such copies of raw files transmitted to the White House, but it would require disclosure *of the identical information contained in those files* if it had been incorporated into a separate memorandum written in response to the White House request. This unreasonable distinction is compelled by neither the language nor the history of Exemption 7.

Under the court of appeals' reading of Exemption 7, the FBI and other law enforcement agencies may avoid disclosure of sensitive information simply by transmitting a copy of its *original* investigatory record rather than incorporating portions of the record into a new document. But this "remedy"—attaching complete, raw investigative files rather than merely summarizing portions of the file in another document—demonstrates the court's excessively literal interpretation of the exemption, an interpretation that is responsive to none of the concerns underlying the

FOIA. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

ARGUMENT

INFORMATION CONTAINED IN INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES AND PRIVILEGED FROM DISCLOSURE UNDER EXEMPTION 7(C) OF THE FOIA RETAINS ITS EXEMPT STATUS WHEN IT IS INCORPORATED INTO RECORDS COMPILED FOR PURPOSES OTHER THAN LAW ENFORCEMENT

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), protects from disclosure "matters that are * * * investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * constitute an unwarranted invasion of personal privacy." In this case, the court of appeals has held that information collected by the FBI in the course of legitimate law enforcement investigations and falling within the category of personal data that Congress recognized as deserving protection from mandatory disclosure loses that exempt status when it is incorporated in a document created for some purpose other than law enforcement.[4] This holding, as we

[4] The court of appeals accepted, arguendo, the government's assertion that the information at issue in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes'" (Pet. App. 14a). Indeed, respondent has acknowledged that, as the case comes to this Court, it must be assumed that the information was "originally acquired for law enforcement purposes" (Resp. Br. in Opp. i, 6). Moreover, the court of appeals did not disturb the district court's finding that release of the information would constitute an unwarranted invasion of personal

show below, rests on an erroneous distinction between "documents" and "information" (Pet. App. 14a-16a) and undermines the purposes of Exemption 7 of the FOIA.

A. The Court of Appeals' Document/Information Distinction Is Erroneous In Light of the Genesis of the 1974 FOIA Amendments

The fundamental basis for the court of appeals' decision is its conclusion that FOIA exemptions "apply only to *documents*," as distinguished from the information contained in documents (Pet. App. 15a; emphasis in original). Thus, in the court's view, information in a document requested under the FOIA is to be evaluated for exemption purposes without reference to the circumstances under which the agency originally collected or memorialized it. And the court of appeals would apply this rule even when the information for which an exemption is claimed appears in the requested document in a form essentially identical to its form in the original memorialization. Whatever the application of this principle to other FOIA exemptions,[5] its application to information—

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privacy. Accordingly, it is undisputed for present purposes that the information, prior to its incorporation into the name check summaries, was exempt from disclosure under Exemption 7(C).

[5] This view is reasonable, for example, as applied to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), an exemption that protects from mandatory disclosure pre-decisional communications within an agency and other "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." If a document is determined to be a final agency opinion—and is therefore *not* a pre-decisional communication protected under Exemption 5 (see *NLRB* v. *Sears, Roebuck*

or portions of records—for which an Exemption 7 (C) claim is asserted makes little sense, given the purpose and legislative history of Exemption 7.

Exemption 7, as originally enacted, permitted the government to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. (1970 ed.) 552(b)(7). In 1974, Congress amended Exemption 7 by substituting the term "records" for "files" and by limiting the bases for withholding "investigatory records" to six specific instances of harm to governmental or individual interests.

As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978), after thoroughly canvassing the legislative history of the 1974 amendments, Congress amended Exemption 7 because it disapproved of the " 'woode[n] and mechanica[l]' approach taken by the D.C. Circuit" in a series of cases commencing with *Weisberg* v. *United States Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974). In

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& Co., 421 U.S. 132, 148-154 (1975))—it is obviously not open to the agency to argue, as to material incorporated in the opinion, that the material is exempt because it was originally composed as an internal advisory communication to the decisionmaker. Once the agency chooses expressly to adopt a particular text as its official view, disclosure of the text to the public may be compelled without violating the congressional purpose of protecting the give-and-take of the decisional process. *Id.* at 161.

The court of appeals was mistaken, however, in relying on *Sears* (Pet. App. 19a-20a) for the proposition that the original source of information is always irrelevant to consideration of its exempt status. The purposes of Exemption 7 are different from those served by Exemption 5, and, as we show below, application of the document/information distinction in this case totally undermines certain of those purposes.

those cases, the D.C. Circuit had concluded that any material that could be considered part of an investigatory file was exempt from disclosure, without regard to any legitimate reason for withholding it. Accordingly, "the thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file." 437 U.S. at 230. In that connection, Senator Hart, the sponsor of the amendment to Exemption 7, pointed out (120 Cong. Rec. 17033 (1974), *reprinted in* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents* 333 (Jt. Comm. Print 1975) (hereinafter "*1975 Source Book*"):

> Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.

Thus, reviewing courts would be required to " 'loo[k] to the reasons' for allowing withholding of investigatory files before making their decisions" to uphold or to overrule agency determinations not to disclose. 437 U.S. at 230, quoting *1975 Source Book* 334 (remarks of Sen. Hart).

Nothing in the legislative history of Exemption 7 suggests that Congress believed that personal information satisfying the criteria of Clause (C) should lose the protection it enjoyed when situated in a record created in the course of a law enforcement investigation simply because it has been copied into another record to be used for some other purpose.

Indeed, as noted above, the change from "investigatory files" to "investigatory records" in Exemption 7 was made precisely to prevent courts from mindlessly applying the exemption on the basis of the *location* of an item, as opposed to its nature and the purposes for withholding it. Contrary to the court of appeals' assumption, the word "record" was not added to distinguish documents from the information they contain.

That the term "record" does not have the talismanic character attributed to it by the court of appeals is also indicated by the language employed by the members of Congress who participated in the debates on Senator Hart's amendment to Exemption 7 and the debates preceding the vote to override President Ford's veto of the 1974 FOIA amendments.[6] Members of Congress used terms such as "matters" and "information" virtually interchangeably with references to "records" or "documents." Thus, for example, Senator Hart, in opposing the judicial constructions of Exemption 7 in *Weisberg* and its progeny, expressed his concern that the exemption as it was then construed would be used to "deny public access to *information* * * * previously available." 120 Cong. Rec. 17033 (1974), *1975 Source Book* 333 (emphasis added). Senator Kennedy explained that when he first introduced his FOIA amendment bill (before the *Weisberg* principle had been firmly established), he had "believe[d] that the public was secure in its right to obtain *informa-*

[6] Because the amendment of Exemption 7 was introduced on the floor and was not included in the original House or Senate bills amending the FOIA, the legislative history is found primarily in the debates on the amendment and the later debates concerning the decision to override President Ford's veto.

tion falling within the 'investigatory file' exception to disclosure mandated by the act." 120 Cong. Rec. 17034 (1974), *1975 Source Book* 335 (emphasis added). Representative Reid stated that the amendment to Exemption 7 as enacted by Congress required that the government "specify some harm in order to claim the exemption" rather than "affording all law enforcement matters a blanket exemption." 120 Cong. Rec. 36626 (1974), *1975 Source Book* 413. Senator Robert Byrd noted that he had originally voted against the bill because he had been concerned that it "would severely hamper law enforcement agencies in the gathering of information from confidential sources in the course of a criminal investigation" but that his fears had been allayed by the change in Clause D of Exemption 7, extending it to "all the information furnished by * * * [a confidential] source * * * in the course of a criminal investigation." 120 Cong. Rec. 36877-36878 (1974), *1975 Source Book* 468. And the Conference Committee report on the amended Exemption 7 remarked that the "disclosure of *information* about a person to that person does not constitute an invasion of his privacy." H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974), *1975 Source Book* 230 (emphasis added).[7]

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[7] The FOIA nowhere defines the term "record." See *Forsham* v. *Harris*, 445 U.S. 169, 178 (1980). In Subsection (a)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(a)(4), however, "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency * * *." The Privacy Act was passed on November 21, 1974, the day on which the Senate overrode a presidential veto of the 1974 amendments to the FOIA, following an extended debate on, among other things, the adequacy of the protections in Exemption 7 as amended. 120 Cong. Rec. 36882, 36917, 36976 (1974). The House had overridden the presidential veto the day before. *Id.* at 36633.

Another indication in the 1974 FOIA amendments that a rigid document/information distinction does not reflect the intent of Congress is the addition of the requirement in 5 U.S.C. 552(b) that "[a]ny reasonably segregable portion of a record" be "provided to any person requesting such record after deletion of the portions which are exempt * * *." This provision requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible unit for FOIA purposes. The district court in this case properly distinguished severable portions of the requested records (*i.e.*, information that had been compiled in legitimate law enforcement investigations and that met the requirements of Clause (C) of Exemption 7), from other portions that did not meet exemption requirements. It then permitted the FBI to delete the exempt portions before disclosing the nonexempt portions.

The court of appeals' theory of the document/information distinction could, of course, be said to rest on the use of the term "compiled" in Exemption 7, as well as on the use of the term "records." The phrase "investigatory records compiled for law enforcement purposes" may be construed as focusing on the time of the physical creation of a record as the relevant point for determining the exempt status of its contents. Thus, in the court's view, the information contained in the summaries was all *compiled* or, in the words of the court, "recompiled" (see Pet. App. 15a), at the time the information was copied into the summaries, and that compilation was not "for law enforcement purposes."

This construction of the statute, however, cannot withstand analysis. Even the court of appeals implicitly acknowledged (Pet. App. 14a-15a) that the

mere "duplication"—by photocopying or any other method—of a record compiled for law enforcement purposes would not amount to a new compilation, requiring a determination of the "law enforcement purposes" for copying the record. Yet the court would apparently require such a determination when information is copied from one record into another with the addition of, for example, a new sentence or two: the new record—not an exact duplicate of the one from which the bulk of its contents were copied—would be viewed as having been "compiled" in its entirety on the date of its physical creation. This distinction between duplicate records and records with substantial portions that are duplicates of other records reflects a simplistic understanding of the information-compilation process. Moreover, as we show below (see pages 23-31, *infra*), the distinction makes no sense in light of either the disclosure purposes of the FOIA or the purposes of the exemption at issue here.

In short, although Subsection (a)(3) of the FOIA, 5 U.S.C. 552(a)(3), obligates agencies to make available upon request reasonably described, nonexempt *records*, the critical factor in determining whether portions of those records are exempt under Exemption 7 is their content—the character of the information they contain. And in determining whether the personal information about individuals contained in requested records has been compiled for law enforcement purposes and meets the other requirements of Exemption 7(C), the circumstances of the original collection—or compilation—of the information by the agency is surely of greater significance than the circumstances of its transfer into another piece of paper

to be used within the government for some non-law-enforcement purpose.[8]

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[8] As the court of appeals noted (Pet. App. 16a-18a), this view is inconsistent with the D.C. Circuit's Exemption 7(C) holding in *Lesar* v. *United States Department of Justice*, 636 F.2d 472, 486-487 (1980), a case in which the court found that *summaries* of FBI surveillance records met the threshold "law enforcement purposes" requirement of Exemption 7 because the summaries, although *not* the underlying surveillance records, were compiled for law enforcement purposes. The summaries had been prepared by a task force in the Justice Department's Office of Professional Responsibility in the course of an entirely lawful inquiry concerning, *inter alia*, the propriety and legality of the FBI's activities with respect to Dr. Martin Luther King, Jr. The court of appeals concluded from the available evidence (*id.* at 487) that the FBI's activities regarding Dr. King amounted to a legitimate investigation, "undertaken in good faith," that had "strayed beyond its initial lawful scope."

The court's conclusion that only the "law enforcement" purposes of the requested records—and not the purpose of the FBI's original compilation of the information they contain—could be considered, led Judge Bazelon to observe, in a concurring opinion (636 F.2d at 492), that there existed a "risk" that "private parties [could] successfully obtain access to protected materials simply because they have been incorporated into a subsequent, unprotected agency document." That "risk," of course, materialized in the decision in the present case.

In our view, it was unnecessary for the court in *Lesar* to look to the purpose of the task force summaries in order to justify protecting from disclosure the personal information collected by the FBI and reported in the summaries. The result was sustainable on the ground that, even assuming that the King investigation had exceeded its "lawful scope," the records generated by that investigation were investigatory records of a criminal law enforcement agency and, as such, were protectable under Exemption 7, at least to the extent that adequate showings were made under Exemption 7(C) or 7(D). *Irons* v. *Bell*, 596 F.2d 468, 471-476 (1st Cir. 1979);

B. The Court of Appeals' Focus on the Purpose of the Document Containing the Sensitive Information Rather Than the Source of the Information Itself Furthers None of the Purposes Underlying the FOIA

The central purpose of the FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 242 (citations omitted). See also *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 152-153; *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 17 (1974). Congress also recognized, however, that there were legitimate reasons for allowing the government to maintain the confidentiality of certain kinds of material. See, *e.g., NLRB V. Robbins Tire & Rubber Co., supra,* 437 U.S. at 224; *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361-362 (1976), quoting *EPA* v. *Mink,* 410 U.S. 73, 80 (1973); *Coastal States Gas Corp.* v. *Department of Energy,* 644 F.2d 969, 984 (3d Cir. 1981) ("goal of citizen access to government information was not intended to overwhelm legitimate privacy interests"). One of the reasons Congress recognized as a legitimate basis for withholding law enforcement investigatory information—the reason embodied in Exemption 7(C)—is the need to protect individuals from "unwarranted invasion[s]" of privacy through embarrassing or otherwise damaging government disclosures of personal information to any member of

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Kuehnert v. *FBI,* 620 F.2d 662, 665-666 (8th Cir. 1980); *Church of Scientology* v. *United States Department of the Army,* 611 F.2d 738, 748 (9th Cir. 1979) (dictum). See pages 26-28, *infra.* The *Lesar* court, however, declined to pass on the validity of this theory (636 F.2d at 486-487 n.83).

the general public who happens to request records containing that information. As Senator Hart explained, this protection extends not only to the subject of an investigation but to "any person mentioned in the requested files." 120 Cong. Rec. 17033-17034 (1974), *1975 Source Book* 333.[9]

In construing the FOIA and applying its exemption provisions in a particular case, a court obviously should seek to read the statute in a manner that accommodates both its general disclosure purpose and its specific confidentiality concerns. *EPA* v. *Mink*, *supra*, 410 U.S. at 80; *Providence Journal Co.* v. *FBI*, 602 F.2d 1010, 1014 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980). The decision of the court of appeals frustrates the congressional intent of protecting information in law enforcement files concerning an individual if that person could "reasonably assert an option to withhold [it] from the public at large because of its intimacy or its possible adverse effects upon himself or his family." *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10

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[9] As this Court has recognized (*Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 379 n.16), the protection for personal privacy in Exemption 7(C) is in some measure stronger than that provided in Exemption 6, which excepts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy" (emphasis added). The Conference Committee responsible for the 1974 FOIA amendments deliberately deleted the term "clearly" from the initial version of Exemption 7(C) in response to a request from President Ford that the phrase "clearly unwarranted" be removed. 120 Cong. Rec. 33158-33159 (1974) (letters between President Ford and Sen. Kennedy); *id.* at 34162 (letters between President Ford and Rep. Moorhead).

(1975). Moreover, by holding that information of a personal nature given to law enforcement officers loses its exempt status if the information is later incorporated into another document not intended for purposes of law enforcement, the ruling of the court below could result in restricting the flow of essential information from private citizens to the government.

At the same time, the denial of the Exemption 7 (C) claims in this case hardly serves to achieve the goal of open government. Respondent filed his FOIA request in order to explore "the extent to which the White House may have used the F.B.I. and its files to obtain derogatory information about political opponents and those that it perceived as enemies" (Pet. App. 4a) and to disseminate information concerning "any illegal and or unethical activities on the part of the government" (J.A. 41). As a result of respondent's request, the FBI has disclosed documents revealing the identity of the presidential aide who requested the material at issue, the general terms of his request (FBI files on 11 named individuals), and the fact that the FBI honored the request as it had honored thousands of prior name check requests from the White House. Disclosure of the withheld segments of information, which concern the private lives of persons mentioned in the FBI files, would not notably aid respondent's asserted purpose, nor would it serve any other purpose "vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co., supra*, 437 U.S. at 242.

That disclosure would, however, vitiate the purposes for including Exemption 7(C) in the statute. Indeed, by making the availability of the protection Congress has extended to personal information con-

tained in "investigatory records compiled for law enforcement purposes" depend on whether a government official's decision to include the information in another document was made for a "law enforcement purpose," the court of appeals has turned the exemption on its head. The court has essentially held that if the White House staff member who requested this information *did not* have a proper law enforcement purpose for invading the privacy of the persons concerned, then those persons' privacy must be invaded even further by the release of the information he obtained to any member of the public upon request.[10]

Such a reading of the statute is wrong for a reason similar to that invoked by the First Circuit in *Irons* v. *Bell*, 596 F.2d 468 (1979). In that case the court gave a broad reading to the phrase "law enforcement purposes" in Exemption 7 so as to protect personal privacy even in cases in which the personal information at issue was collected by criminal law enforcement agencies in investigations undertaken for possibly questionable purposes. As the court explained (*id.* at 474):

> The character of the materials excluded under Exemption 7 at least suggests that "law enforcement purpose" is as much a description of the type of agency the exemption is aimed at as it

[10] Abramson's assertion (J.A. 40) that it is not his intent "to publish embarrassing personal details about the lives of certain individuals" is irrelevant. The FOIA provides for disclosure to "any person," without regard to his need for it or any promises he might make to keep it confidential. See *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149. If the general public interest in disclosure of the information outweighs the individual's privacy interests, then the information must be disclosed to any member of the public. See *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 372-373.

is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties. We see strong policy reasons supporting this reading of "law enforcement purpose" which would, assuming other conditions are met, extend the exemption to all investigative files of a criminal law enforcement agency. First, if the unjustified nature of an FBI investigation makes Exemption 7 inapplicable, material may be released even though it "constitute[s] an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Such a result would harm innocent individuals who had no way to test the legality of an FBI investigation.[11]

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[11] The court also pointed out the damage to the interests protected by Exemption 7(D) (relating to confidential sources) by making the applicability of Exemption 7 turn on a judgment concerning the propriety of the investigation in question, and it referred to the "unmanageable burden" that would be placed upon district courts trying, "on a record grown cold after years or decades," to "second or third guess the judgment of a Special Agent in Charge that an investigation was warranted." *Ibid.*

It should also be noted that, although Abramson disclaimed any interest in obtaining confidential source material for which the FBI raised an Exemption 7(D) claim (J.A. 37-38), the rationale of the court of appeals' opinion would also appear to preclude the agency from protecting that information as well if, as here, it has been copied into documents not found to have been compiled for law enforcement purposes. The lower courts have recognized that allowing the protection for confidential sources to be destroyed by such subsequent events as the transmittal of the confidential information from one law enforcement agency to another or the termination of the investigation for which the information was furnished would defeat the purposes for which this exemption was created. See *Sands* v. *Murphy*, 633 F.2d 968, 970 (1st Cir. 1980) (confidential source protected even though promise of confidentiality was made to the source by an agency different from the one holding the requested records); *Pope* v. *United States*, 599 F.2d

Accord, *Kuehnert* v. *FBI*, 620 F.2d 662, 666-667 (8th Cir. 1980). See also *Providence Journal Co.* v. *FBI*, *supra* (sustaining Exemption 7(C) claim for contents of records of illegal FBI telephone surveillance of an individual). In the present case, the persons about whom information appears in legitimate investigatory records of the FBI are hardly responsible for the copying of that information into other records, and no statutory purpose is served by making the availability of that information to the general public turn on the circumstances of the copying, *e.g.*, whether the copying is done for law enforcement purposes, other proper governmental purposes, or improper purposes.[12]

Indeed, the failure of the court of appeals' analysis to serve any discernible purpose of the FOIA is

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1383, 1387 (5th Cir. 1979) (Exemption 7(D) protection remains after investigation or enforcement proceeding is concluded); *Lame* v. *United States Department of Justice*, No. 80-2458 (3d Cir. July 16, 1981), slip op. 11 n.6 (same as to Exemption 7(C)). The subsequent recopying of confidential source material into another document similarly should not defeat an exemption claim asserted to protect the information in the second document.

[12] We are advised that under current FBI practice, a name check request submitted from the White House is made on a standard form with spaces in which the submitting office (the White House Security Office, the Executive Office of the President, or the Technical Services Division of the United States Secret Service) must indicate whether the request is made for the purpose of checking the background of a prospective presidential or White House staff appointee or for the purpose of assuring the safety of the President in the presence of those who will have access to White House events.

In addition, certain safeguards respecting the transmittal of records within the government are now established in Subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), which took effect in 1975.

apparent in its treatment of what the court referred to (Pet. App. 18a) as the "attachments" to the documents. The court of appeals did not conduct an in camera inspection of the documents at issue, and it is not entirely clear to what "attachments" it was referring. But some of the documents disclosed in whole or in part in this case are, on their face, clearly summary memoranda prepared on earlier occasions pursuant to White House name check requests. For example, the October 6, 1969, summary prepared on John Kenneth Galbraith notes that memoranda of investigation results concerning him, dated March 6, 1961, January 19, 1965, and February 4, 1965, were attached. If, in fact, those earlier memoranda were compiled for law enforcement purposes (*e.g.*, to assist the White House in a security investigation of Mr. Galbraith's fitness for presidential appointment), then, under the court's analysis, the FBI may refuse to disclose any information in the memoranda if the disclosure would constitute an unwarranted invasion of personal privacy. However, if the FBI had simply lifted paragraphs out of those memoranda and retyped them into the 1969 summary, instead of attaching the memoranda themselves, that information would *not* be protected from disclosure under the court's rationale. The court of appeals therefore remanded for a determination "whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests" (*id.* at 21a-22a; emphasis in original) and whether "these original documents were sent to the White House as initially compiled and without *any* modification" (*id.* at 21a; emphasis added).

Under the court of appeals' reading of Exemption 7, then, the FBI and other law enforcement agencies

may avoid disclosure of sensitive information simply by transmitting a copy of their *original* investigative records rather than by incorporating portions of the record into new documents.[13] But this "remedy"—attaching complete, raw investigative files rather than merely quoting or summarizing portions of the file in another document—plainly emphasizes the court's excessively literal interpretation of this exemption. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

In sum, the court of appeals' distinction between information in original law enforcement records and information transcribed from those records into other documents makes no sense either as a means of ensuring that the public is informed about the use made of law enforcement files or as a means of distinguishing between circumstances in which personal privacy claims should be honored and circumstances in which they should not. Where the deleted information is shown to have been taken from investigatory records compiled for law enforcement purposes, and where the agency establishes that disclosure would cause

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[13] It would hardly enhance the protection of personal privacy—or any other purpose of the FOIA—for the FBI, for example, to be required to transmit entire original file documents (rather than pertinent portions) to the State Department for use by the Visa Office in making decisions on visa applications. It would similarly be pointless to require the State Department, as a condition of retaining the exemption, to duplicate such documents, rather than to excerpt pertinent portions, when it sends memoranda to United States embassies abroad for use in responding to foreign governments who seek assurances that they are dealing with reputable persons in business negotiations. See Pet. 16-17.

one of the six harms specified in Exemption 7, the exemption claims for those deletions should be sustained. Such a ruling achieves "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 381 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners

v.

HOWARD S. ABRAMSON,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

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FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners

v.

HOWARD S. ABRAMSON,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This action arose when Howard S. Abramson, the Respondent, as a professional journalist, attempted to use the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to acquire information concerning the extent to which the White House may have used the Federal Bureau of Investigation (FBI) and its files to obtain derogatory information about political opponents and those that it perceived as enemies (Pet. App. at 4a).

On June 23, 1976, Abramson filed a request pursuant to the FOIA seeking the following documents from the FBI (J.A. 7-8):

— Copies of any and all information contained in the FBI's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;

— Copies of any and all information so transmitted;

— An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmitted "memoranda" on several individuals to Mr. Ehrlichman;

— A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data;

— Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman; and

— A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

Clarence M. Kelley, then the director of the FBI, notified Abramson by letter dated July 23, 1976, that the Bureau refused to search its files for any such information until Abramson obtained notarized authorization for the disclosure of the information from the subjects of the request (Pet. App. 5a). Otherwise, Kelley asserted, the information was exempt from disclosure pursuant to Exemp-

tions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6)[1] and (b)(7)(C), both of which deal with exemptions to disclosures, under certain specified conditions, that would also involve unwarranted invasions of personal privacy.[2]

On receiving Kelley's response, Abramson assumed his initial request was too specific and that in its specificity it violated the privacy of others (Pet. App. 5a-6a). He therefore filed a new and broader request on August 3, 1976, which did not include the names of specific individuals (Pet. App. 6a). On August 20, 1976, Kelley denied Abramson's second request saying he failed to reasonably describe the records sought (Pet. App. 6a).

After exhausting his administrative appeals, on December 20, 1977, Abramson filed suit in the United States District Court for the District of Columbia to enjoin the FBI and the Department of Justice from withholding the requested records and to make them immediately available to him (Pet. App. 7a). The Petitioners' answer denied all liability under the FOIA, consistent with their position throughout the administrative appeals (*id.*).

However, after filing an answer, Petitioners reprocessed Abramson's request and provided him with four groups of records, a total of 84 pages of material, some with deletions (Pet. App. 7a, 9a-10a, n.12.). Petitioners asserted that that deletions were made pursuant to Exemptions 1,

[1]Exemption 6 authorizes withholding documents from disclosure that are "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The government no longer asserts Exemption 6 as a justification for nondisclosure (Pet. App. 5a, n. 8).

[2]Exemption 7(C) authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .(C) constitute an unwarranted invasion of personal privacy . . . ."

7(C) and (D) (*id*)[3]. The four groups of records each consist of a cover letter dated October 6, 1969, from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to then-President Richard M. Nixon, with enclosures (*i.e.*, name check summaries and, in some cases, attachments) regarding FBI name checks on the individuals listed in the cover letters (Pet. App. 9a-10a, n.12).

The information at issue here consists of deletions from one of those four groups of records, referred to as Document 3, which is composed of (i) the cover letter dated October 6, 1969, listing the names of 11 individuals about whom "name check" requests had been made (J.A. 29); (ii) name check summaries of FBI files containing information on 10 of the 11 individuals; and (iii) an article written by John Kenneth Galbraith, an advertisement in the *New York Times* of September 28, 1969, prepared by the Vietnam Moratorium Committee and endorsed by the 11 individuals and four senators (J.A. 33-6), and a typed list of the individuals whose names appeared in the advertisement (Pet. App. 8a, n. 12).

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[3]Exemption 1, 5 U.S.C. §552(b)(1), authorizes withholding of documents that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . ."

The material expurgated pursuant to Exemptions 1 and 7(D) is no longer at issue (Pet. App. 3a, n. 5).

On January 3, 1979, the District Court issued an order denying Petitioners' motion to dismiss or, in the alternative, for summary judgment, holding (Pet. App. 32a-34a), *inter alia*, with respect to Exemption 7(C) and (D), ". . . that the agency had failed to show that the information was compiled for law enforcement, rather than political, purposes" (Pet. App. 26a-27a).

In September, 1979, Petitioners filed their renewed motion for summary judgment, additional affidavits by two FBI employees describing the four documents that were processed in response to Abramson's request, and an explanation in each instance of the justification for nondisclosure (J.A. 5, and Pet. App. 9a). On September 25, 1979, Abramson filed a modified request, seeking only the material withheld from Document 3 by the Petitioners under Exemption 7(C) (Pet. App. 10a and J.A. 37-41).

The District Court again found that the FBI had failed to show that the information was compiled for law enforcement, rather than political, purposes, ruling on November 30, 1979, that:

> . . . Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants [the Government] have failed to meet their burden and summary judgment will be granted in favor of the plaintiff [Abramson] on this point (Pet. App. 27a).

However, the District Court did not order the documents released, ruling that Exemption 7(C) was validly invoked by the Government ". . . because disclosure would constitute an unwarranted invasion of personal privacy" (Pet. App. 27a).

Respondent Abramson appealed the District Court's ruling on Exemption 7(C) claims (Pet. App. 11a & n. 14) and the Court of Appeals reversed (*id.* at 1a-22a).

Before the Court of Appeals, Petitioners "acknowledged that the 'name check' summaries were not compiled for law enforcement purposes," (Pet. App. 14a) but argued that the information contained in such documents was nevertheless withholdable under Exemption 7(C) because it had originally been compiled by the FBI for law enforcement purposes (*id*).

However, the Court of Appeals found, "Even if we accept the truth of the Government's assertion, we are still left with undisputed facts indicating that . . . the documents constituting the 'name check' summaries were not compiled for any legitimate law enforcement purposes" (Pet. App. 14a-15a).

Furthermore, the Court of Appeals held, ". . . the statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to *documents,* and not to the use of the information contained in such documents. Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA" (Pet. App. 15a) (original emphasis).

Since Petitioners have conceded that the ". . . White House 'name check' requests resulted in the production of documents which are distinct from the underlying documents already contained in the FBI files. . ." (Pet. App. 15a-16a) and have acknowledged that the "name check" summaries were not compiled for law enforcement purposes (Pet. App. 14a), the Court of Appeals found ". . . that the recompiled summary documents have been

improperly withheld" (Pet. App. 18a). The Court of Appeals reversed the District Court and instructed it to require Petitioners to release all of the "name check" summaries heretofore withheld pursuant to Exemption 7(C) (Pet. App. 22a).[4]

Petitioners' petition for rehearing, with suggestion for rehearing en banc, was denied by nine judges, with two other judges dissenting (Pet. App. 24a-25a).

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[4]The Court of Appeals did not rule on whether the "attachments" to Document 3 could be withheld under Exemption 7(C). Instead it remanded this issue to the District Court, with the following instructions:

> ". . . We remand to the District Court for a finding on the issue of whether the attachments that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation [emphasis in original]. Should the District Court on remand find that the 'attachment' documents are in fact investigatory records which were compiled for law enforcement purposes, *then* a determination must be made as to whether the attachments are exempt from disclosure under Section (b)(7)(C)" (Pet. App. 21a-22a) (emphasis added).

The issue of the "attachments" to the name check summaries came up for the first time during oral argument before the Court of Appeals. That court made the distinction in its opinion without first examining the nature of the records released to Abramson with certain lines deleted. It is the availability of those deleted words and lines under exemption 7(C) which is now before this Court. Petitioners and Abramson apparently dispute how the word "attachments" was used by the Court of Appeals. Abramson believes that the Court of Appeals divided the documents into two categories: (1) all the name check summaries prepared in response to *any* White House request included in Document 3, and (2) unspecified "attachments" to these summaries (see P. 4, *supra*, for description of document). Petitioners apparently contend that deleted portions of such name check summaries prepared *prior* to the 1969 White House request and included in Document 3 are the "attachments" referred to by the Court of Appeals (Pet. Br. at 29).

SUMMARY OF ARGUMENTS

The Court of Appeals correctly held that the documents in question had been compiled for non-law enforcement purposes and were thus not exempt from disclosure pursuant to Exemption 7(C).

1. The plain meaning of Exemption 7, which protects "investigatory records compiled for law enforcement purposes," leaves no room for doubt that the threshold factor in determining the applicability of the exemption is the purpose for which the document was prepared and not the origin of the information contained therein. Since the lower courts have found that the documents in question were compiled for partisan political reasons, and not for law enforcement reasons, the government has failed to meet the threshold requirement of Exemption 7. Therefore, the requested records cannot be withheld under Exemption 7(C).

2. Abramson's interpretation of the plain meaning of Exemption 7(C) is supported by the underlying legislative history and Congress' intent that the FOIA's exemptions be narrowly construed. Petitioners are attempting to interpret the legislative history to persuade this Court to create a new privacy exemption, even though Congress has directed the courts to read the Act in a manner which encourages disclosure and discourages expansion of the existing exemptions or creation of new ones.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT AGENCY RECORDS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 7(C) ONLY IF THEY MEET THE THRESHOLD REQUIREMENT OF BEING "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES," NOTWITHSTANDING THE ORIGIN OF THE UNDERLYING INFORMATION IN SUCH RECORDS.

The Court of Appeals correctly held that records may be withheld under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), only if they meet the threshold requirement of being "investigatory records compiled for law enforcement purposes." Since the District Court found – and Petitioners have conceded – that the requested records do not meet this requirement, Petitioners cannot avail themselves of Exemption 7's clause (C), which allows an agency to withhold the records in issue, "but only to the extent that production of such records would. . . (C) constitute an unwarranted invasion of personal privacy."

Petitioners claim, in effect, that notwithstanding the failure of the requested records to meet Exemption 7(C)'s standards for non-disclosure, the records are nonetheless exempt because the information contained therein was originally compiled for law enforcement purposes and that this exempt status passes through and remains intact in any recompilation of the information, regardless of the purposes for such recompilation.

That interpretation is nowhere supported by the literal language of the FOIA and the underlying Congressional intent. Petitioners are, in effect, claiming an exemption for "pass through" material. This argument is belied, however, by the literal language of the statute, the intent

of Congress that the FOIA serve as a disclosure statute and Congressional insistence that requested "records" – not "information" – be exempt only to the extent they fall within one of the nine specified exemptions, which are to be narrowly construed. If the Petitioners' contention is upheld, they would be receiving a far broader exemption than Congress ever intended.

A. The Plain Meaning Of Exemption 7 Requires A Threshold Inquiry Into The Purpose For Which The Requested Records Were Compiled And Not The Purpose For Which The Underlying Information Was Originally Compiled.

The Freedom of Information Act was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 351 (1979); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *EPA v. Mink*, 410 U.S. 73, 80 (1973). To make it "clear beyond doubt that all materials of the government are to be made available to the public . . . unless specifically allowed to be kept secret by one of the exemptions. . ." and that the exemptions are exclusive, Congress provided that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, *except as specifically stated* . . ." 5 U.S.C. § 552(c) (emphasis added); S. Rep. No. 813, *supra* at 10; *EPA v. Mink, supra*, 410 U.S. at 79; *Department of Air Force v. Rose, supra*, 425 U.S. at 361; *Jordan v. Department of Justice*, 591 F.2d 753, 761 (D.C. Cir. 1978) (*en banc*).

The government bears the burden of proving that an exemption applies, 5 U.S.C. § 552(a)(4)(b), and the exemptions are to be narrowly construed. *Department of Air Force v. Rose, supra,* 425 U.S. at 361; *Vaughn v. Rosen (I),* 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974). Moreover, because the Act's primary objective is the fullest possible disclosure of agency records, any doubts about the proper interpretation of an exemption are to be resolved in favor of disclosure. *Department of Air Force v. Rose, supra,* 425 U.S. at 365, *citing with approval, Vaughn v. Rosen (II),* 523 F.2d 1136, 1141 (D.C. Cir. 1975).

It is in this context that the Court should approach the issue raised before it in this case. The FOIA exemption at issue, Exemption 7(C), protects from disclosure "matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would. . .(C) constitute an unwarranted invasion of personal privacy."

The Court of Appeals correctly gave effect to the plain meaning of this language and ruled that records may be witheld under clause (C) only if they first fall within the definition of "investigatory records compiled for law enforcement purposes." The courts have consistently held that the "threshold question" or "critical factor" to Exemption 7 is the purpose for which the document was prepared, and not the information contained therein. *Lesar v. U.S. Dept. of Justice,* 636 F.2d 474 (D.C. Cir. 1980); *Pope v. United States,* 599 F.2d 1383 (5th Cir. 1979); *Rural Housing Alliance v. U.S.D.A.* 498 F.2d 80, 82 (D.C. Cir. 1974) (held with respect to Exemption 7 that "The purpose of the 'investigative files' is thus the critical factor.")

In fact, the Justice Department itself encouraged agencies to follow this analysis in a memorandum explaining how to implement the 1974 FOIA amendments.[5]

In the instant case, the District Court gave Petitioners two opportunities to prove that the requested records were exempt from disclosure. Despite the submission of two lengthy affidavits, the District Court ruled that: ". . . there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants [Petitioners] have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point" (Pet. App. 11a).

In addition, even ". . . the Government [Petitioners] acknowledged that the 'name check' summaries were not compiled for law enforcement purposes . . ." (Pet. App. 14a).

Giving effect to the plain meaning of Exemption 7, then, warrants upholding the Court of Appeals' decision that the requested records are not exempt under Exemption 7(C).

Petitioners, however, maintain that the origin of the information contained in the document is the threshold issue.

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[5]Even the Justice Department has acknowledged, when it attempted to clarify the FOIA for the entire government, that the threshold question to Exemption 7 is the *purpose* for which the document was compiled, and not the information contained therein. (*Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act*, U.S. Department of Justice, February 1975, p. 6).

"Once it is determined that a request pertains to 'investigatory records compiled for law enforcement purposes,' *the next* question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended Exemption 7." (Id. at 6-7, emphasis added.)

The courts, on the other hand, have held that when the cited FOIA exemption relates to a specific type of document, it must refer to the document in question, and does not pass through from the underlying documents which may be incorporated, in whole or in part, into the document. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (held that documents that are arguably exempt from disclosure under Exemption 5 of the FOIA lose their exemption when they are incorporated into non-exempt documents; and that the original document which was incorporated by reference in a non-exempt document could still be exempt under the Act, but that the recompiled document was disclosable); *Niemeier v. Watergate Special Prosecution Force,* 565 F.2d 967 (7th Cir. 1977) (Memoranda lost its exempt status when quoted and expressly adopted by reference by Watergate Special Prosecution Force); *Simpson v. Vance,* 648 F.2d 10 (D.C. Cir. 1980) (held that the State Department Biographic Register was not exempt, even though information in the Register was extracted from personnel files which may have been exempt under Exemption 6).

The Court of Appeals in this case noted that an argument similar to the one raised by the Petitioners, concerning whether the asserted status of the underlying documents would affect the threshold requirement of Exemption 7, had been recently considered and rejected by the court in *Lesar v. U.S. Dept. of Justice,* 636 F.2d 472 (D.C. Cir. 1980) (Pet. App. 16a). In *Lesar,* the requester sought the disclosure of deletions from reports released to him that had been prepared by the Civil Rights Division and a special task force in the Department of Justice concerning FBI surveillance of Dr. Martin Luther King. The Justice Department had excised these materials, claiming as authority Exemption 7(C).

The *Lesar* court found that the original investigation of Dr. King by the FBI had at some point "strayed beyond its initial lawful scope and took on the nature of a campaign to harass and attempt to discredit Dr. King." (*Id.* at 487).[6] But that court, after noting there was no dispute about the recompilation of the information from the files being for a law enforcement purpose, determined the document in question met the threshold requirement of Exemption 7. That court rejected Lesar's "pass through" argument that it look to the purpose for the *original* compilation of the information, and "pass through" that purpose to any recompilation, regardless of the reason for the creation of the recompiled document (*id.*).

In the converse situation presented here, the Court of Appeals correctly found that, pursuant to the clear statutory language of Exemption 7(C), the threshold test is the purpose for which the requested document was compiled, and not the origin of the information contained within the document (Pet. App. 15a). Since the threshold requirement was not met, Exemption 7 cannot be used to bar disclosure.

B. The Court Of Appeals' Interpretation Of Exemption 7(C) Is Supported By The Legislative History And Congressional Intent In Enacting The FOIA.

It is a well established principle of statutory construction that where the plain meaning of a statute is apparent on its face, a court need not look beyond the language of

[6]Writing for the court, Judge Wilkey observed that if the documents in dispute were the actual records relating to FBI surveillance of Dr. King, "we would have serious doubts whether they could be construed in their entirety as 'investigatory records compiled for law enforcement purposes'," *id.* at 486.

the statute to its legislative history. *Caminetti v. United States,* 242 U.S. 470, 485 (1917); *Markham v. Colonial Mortgage Service Co. Associates Inc.,* 605 F.2d 566, 569 (D.C. Cir. 1979); *United States v. Rone,* 598 F 2d. 564, 569 (9th Cir.); *cert. denied sub nom. Little v. United States,* 445 U.S. 946 (1979); *see also* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum,. L. Rev. 527, 533 (1947). Moreover, the proper function of legislative history is to *resolve,* not create, ambiguities. *United States v. Missouri Pac. R. Co.,* 278 U.S. 41, 48 (1928); *Jordan v. Department of Justice supra,* 591 F.2d at 768; *FTC v. Manager, Retail Credit Co.,* 515 F.2d 988, 995 (D.C. Cir. 1975).

As explained in the prior section, the plain language of Exemption 7 requires the Government to first meet the burden of proving that the document was compiled for law enforcement purposes.

Nevertheless, Petitioners, having failed to meet the threshold requirement (*i.e.,* burden of proof) of the language of their claimed exemption (Pet. App. 10a and 18a), are now citing the legislative history behind Exemption 7 and arguing, in effect, that the Court should create a new privacy exemption (Pet. Br. 15-30).

This argument cannot succeed, however, for the legislative history supports Abramson's position, and both Congress and this Court have made it clear that agency records are exempt only to the extent they fall within one of the FOIA's nine exemptions. *Department of Air Force v. Rose, supra; EPA v. Mink, supra.* The FOIA does not permit the courts to balance the policy considerations involved in disclosure or nondisclosure of a particular document. *Jordan v. Department of Justice, supra,* 591 F.2d at 781. Congress has already done this by establishing

specific categories of exempt information, and it remains the exclusive prerogative of Congress to fashion an exemption where needed to protect a legitimate governmental interest. *Id; cf., Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978); *T.V.A. v. Hill,* 437 U.S. 153, 195 (1978). For the courts to assume this legislative function would alter the balance Congress struck, and thereby improperly intrude on the legislative function. Indeed, in those instances in the past where the courts have expanded upon the scope of one of the exemptions, Congress did not hesitate to act quickly to amend the Act in order to reinstate the specific legislative purpose.[7]

The 1974 amendment to Exemption 7 was specifically enacted because the courts were interpreting Exemption 7 "woodenly and mechanically"[8] as barring disclosure of *any* record contained in an "investigatory file," regardless of whether the document was investigatory in nature or

[7]In 1974, in response to the Supreme Court's decision in *EPA v. Mink,* 410 U.S. 73 (1973), Congress amended the FOIA to make it clear that courts were authorized to conduct *in camera* review of the government's national security claims under Exemption 1 and to determine *de novo* whether information was "properly classified" within the meaning of the exemption. *See* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book; Legislative History, Texts, and Other Documents 333 (Jt. Comm. Print 1975) (hereinafter "1975 Source Book"). At the same time, Congress also amended Exemption 7 in direct response to a series of decisions of the District of Columbia Circuit which had interpreted the exemption broadly. *Id.* at 335-6. In 1976, Congress amended the Act to overcome an overly expansive interpretation of Exemption 3 by the Supreme Court in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975). H.R. Rep. 880, Part I, 94th Cong., 2d Sess. 23 (1976).

[8]1975 Source Book at 335. As Senator Hart stated in introducing his amendment, "Our amendment is broadly written, and when any one of the reasons for non-disclosure is met, the material will be unavailable. But the material cannot be, and ought not to be, exempt

(Cont.)

not. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). As a result, the amendment to Exemption 7 proposed by Senator Hart and ultimately adopted narrowed the scope of the Exemption from "investigatory files" to "investigatory records" (1975 Source Book 332).

In introducing his amendment to Exemption 7 on the floor of the Senate, Senator Hart stated: "Recently, the courts have interpreted the seventh exception to the FOIA to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes – a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made." (120 Cong. Rec. 17033, reprinted in 1975 Source Book p. 332.[9])

After Senator Hart introduced the amendment to Exemption 7, there was extensive Senate debate on it. It is clear from that debate that non-law enforcement records of the FBI are not to be withheld under Exemption 7 (1975 Source Book at 346-348).

In addition, the Senate, during the debate which led to the successful override of the President's veto of the 1974 amendments, specifically noted its approval of the District

(Cont.)
merely because it can be categorized as an investigatory file compiled for law enforcement purposes." *Id.* at 333. Later in the debate, Senator Kennedy added that the amendment was designed to overrule some recent D.C. Circuit opinions which were contrary to "the interpretation in the Senate's development of that [1966 FOIA] legislation that the 'investigatory file' would be extremely narrowly defined." *Id.* at 349.

[9]Since the amendment (which was adopted) was introduced on the floor, it was not included in the original House or Senate bills amending the FOIA. Thus, the legislative history is found primarily in the debates on the amendment, and in the later debates concerning the decision to override President Ford's veto.

Court's holding that *FBI files* compiled for purposes other than law enforcement were not exempt pursuant to Exemption 7, referring to *Stern v. Richardson,* 367 F. Supp. 1316 (D.D.C. 1973) (1975 Source Book pp. 440-441). Not only was specific reference made to the *Stern* case, but it was also stated on the Senate floor by the floor manager of the 1974 amendments that Exemption 7 was specifically designed to disclose such abusive practices of the FBI.

> "In the case where NBC newsman Carl Stern took the FBI to court to obtain documents relating to counterintelligence programs, the Bureau took the position that those documents were 'investigatory files.' The FBI argued this point strongly, but a Federal judge even more forcefully found it lacking in substance. . . No doubt this is just the kind of document – revealing a program that earlier this week the Justice Department itself characterized as involving 'practices that can only be considered abhorrent in a free society' – that the FBI would find impractical to review and unlikely to be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about. . . As these cases illustrate, *not even the FBI should be placed beyond the law, the freedom of information law.* Watergate has shown us that unreviewability and unaccountability in government agencies breeds irresponsibility of government officials." (1975 Source Book p. 440) (emphasis added).[10]

[10]*See, e.g.,* remarks of Senator Weicker (1975 Source Book at 346-348). Abramson believes that the White House use of the FBI to obtain confidential information – disclosing not only personal information but also names of informants for partisan political reasons – is just the kind of "abhorrent practice" Congress refused to exempt (Cont.)

At the same time Congress recognized that all of the government's files would be released if they were not compiled for law enforcement purposes (or exempted under another provision of the FOIA), it was also aware that personal information concerning individuals was contained in such files. However, the statutory structure of the amendments clearly shows that Congress determined to prevent disclosure of personal information under Exemption 7 only from files which had been compiled for law enforcement purposes.

And even the limited protection Congress granted under Exemption 7 was not absolute. Under clause (C), the individual's interest in privacy is required to be balanced by the court against the public's right to an open government. *See e.g. Lesar, supra.; Common Cause v. Nat'l. Archives and Records Service,* 628 F.2d 179 (D.C. Cir. 1980). In the case of records compiled for non-law enforcement purposes, the balance under exemption 7(C) is automatically tipped in favor of disclosure.

(Cont.)
from disclosure. Further, Abramson believes that some of the practices that Petitioners claim they will be forced to cease if the Court of Appeals is upheld, also typify just that kind of activity.

While some of the practices listed by Petitioners appear to be for legitimate law enforcement goals, many clearly are not. For example, the FBI claims it must be able to send such information to our embassies so they can "assure" foreign governments about the integrity of American citizens (Cert. Pet. 16-17). Petitioners never explained why the information sent to such embassies could not be summaries, with certain details expurgated.

Petitioners have also argued that the FBI must be able to disclose such highly confidential information for various management or administrative purposes such as audits and budget considerations. Petitioners' purposes could be adequately satisfied, and individual's privacy protected, with summaries either omitting any personal identifiers, or only categorizing the specific information. In any event, those practices and the applicability of Exemption 7, or any of the other provisions of the FOIA to such documents, are not before the Court at this time.

Petitioners' main argument is that the Court of Appeals' decision was based on the faulty assumption that the word "records" was added to distinguish documents from the "information" they contain (Pet. Br. p. 18). This contention is totally unfounded.

Nowhere in the Court of Appeals' decision is reference made to the distinction between "files" and "records." Petitioners' sole argument in support of their claim is their own assertion that the Court of Appeals could not have reached its decision by focusing on the reason the documents were compiled in the first place because of the court's treatment of the attachments (Pet. Br. at. 20-21).[11]

Although the use of the term "records" instead of "information" in the amendments clearly supports the Court of Appeals' decision, the plain meaning of the statute made it unnecessary for the court to rely on any legislative history (Pet. App. 15a).

Petitioners are attempting to have the courts exchange the Congressionally selected term "records" in Exemption 7 for "information," and to create a new privacy exemption. Although there can be no question that Congress was concerned about the disclosure of information when it amended the FOIA in 1974, the language of Exemption 7 refers to "records" and not to "information".[12] The legislative history used by Petitioners to argue that Congress used "record" synonymously with "information"

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[11]Even Petitioners have previously acknowledged the Court of Appeals' basis for its position with respect to the attachments was its interpretation of *Sears* (Cert. Pet. 17, n.6). However, see infra note 13.

[12]Petitioners make much of the seeming interchangeable use of the words "files," "records" and "information" during Senate floor debates (Pet. Br. at 17-19). Suffice it to say that this alleged ambiguity strengthens the case for sticking to the plain meaning of the statute, *i.e.*, "records".

does not withstand serious analysis (Pet. Br. 18-19). When records are released, information is, by definition, released. Therefore, the quotes relied on by Petitioners are not using the terms synonymously, but rather refer to what will occur when the records are released. For example, Petitioners first cite Senator Hart's statement that the courts' interpretation of the pre-amendment Exemption 7 would "deny public access to *information*. . ." 1975 Source Book 333 (Pet. Br. 18 [emphasis added by Petitioners]). This citation, while again demonstrating Congress' concern about the lack of dissemination of information, does not support Petitioners' contentions. Nor does Petitioners' next citation of Senator Kennedy's remarks explaining why his bill had not included Senator Hart's floor amendment (Pet. Br. 18-19). He had "believe[d] that the public was secure in its right to obtain *information* falling within the 'investigatory file' exception to disclosure mandated by the act." (1975 Source Book 335 [emphasis added by Petitioners]). Again this demonstrates Congress' concern about dissemination of information. In both of these quotations, the Senators are referring to the pre-amended Exemption. And their understanding was that when "files," like "records," are released, information, by definition, would be released.

In summary, the Court of Appeals decision in this case was based on the clear statutory language of and intent behind Exemption 7(C), which indicates that the threshold test applies to the document and not to the information contained in such documents. In addition, its decision to release this FBI document is clearly supported by the legislative history.

One final point should be made. The Court of Appeals remanded the case in part to allow the District Court to examine the contents of the "attachments" to the "name

check summaries," noting that the court was "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created" (Pet. App. at 22a). Petitioners have stated that "it is not entirely clear to what 'attachments' the court was referring," (Pet. Br. at 29), and, as noted in note 4 *supra*, Petitioners and Abramson apparently disagree on what the Court of Appeals meant by the "attachments" at issue.

Under Abramson's interpretation, deleted portions of the "attachments' are not barred from disclosure under Exemption 7(C) because (1) they fail to meet the threshold requirement of being "investigatory records compiled for law enforcement purposes" and (2) even if the underlying data upon which the "attachments" were based are exempt, that exemption does not pass through under this Court's analysis in *NLRB v. Sears, Roebuck & Co., supra.*[13] Abramson believes that he is entitled to have access to the deleted portions of the "attachments," for reasons set forth earlier in this brief (see 9 to 22). If, however, this Court does not wish to choose between conflicting interpretations concerning the precise nature of these attachments, Abramson respectfully suggests that the judgment of the Court of Appeals be affirmed and that the portion of the case dealing with the attachments be remanded to the District Court to determine the nature of the attachments and whether they, or portions thereof, can be withheld under Exemption 7.

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[13]Abramson believes that the Court of Appeals interpreted *Sears* too broadly. In *Sears*, the court was concerned with whether documents which were originally exempt would lose their exemption because they were incorporated by reference into a non-exempt document, not as in the case before the bar, whether copies of the original document lose their exemptions if they are attached to a non-exempt document.

CONCLUSION

The judgment of Court of Appeals should be affirmed.

Respectfully submitted.

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No. 80-1735

In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. Respondent and Amicus Curiae Freedom of Information Clearinghouse have chosen to respond to the government's arguments largely by misstating them. Contrary to respondent's assertion, the government does not contend that the "exempt status [of particular information] passes through and remains intact in *any* recompilation of the information, regardless of the purposes for such recompilation" (Resp. Br. 9; emphasis added). And contrary to Amicus Clearinghouse's assertion (Br. 17), acceptance of the government's submission does not mean that an agency would always be free to withhold requested records on the ground that they contain information that was within a Freedom of Information Act (FOIA) exemption when it was first collected by the agency. Our argument is much narrower. We contend only that information that is initially

recorded for a law enforcement purpose and that falls within one of the six categories specified within Exemption 7 does not *necessarily* lose its exempt status when it is copied from one document into another document that is created for a non-law enforcement purpose.

There may often be circumstances in which the information, out of its original context, loses the character that originally brought it within the protection of Exemption 7. For example, information assembled about an individual in connection with a criminal investigation may be exempt in its original form because its disclosure would "interfere with enforcement proceedings" or "constitute an unwarranted invasion of personal privacy" (*e.g.*, by identifying an innocent individual as someone being investigated in the course of a criminal case). The same information, however, stripped from its original context and included in a document prepared for purposes other than law enforcement, might well be disclosable without interfering with a law enforcement proceeding or invading personal privacy; and if this were so, the exempt status of the information in its original form obviously would not survive. Thus, as we explained in our opening brief (Br. 15-16 n.5), our position is consistent with the proposition, illustrated by *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-154 (1975), that the exempt status of material *may* be altered when it is put to a use different from that for which it was originally assembled, if the purpose for invoking the exemption no longer exists.[1]

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[1] *Niemeier* v. *Watergate Special Prosecution Force*, 565 F. 2d 967 (7th Cir. 1977), on which respondent relies (Br. 13), is simply an application of the *Sears* Exemption 5 holding. We disagree with the analysis of *Simpson* v. *Vance*, 648 F. 2d 10 (D.C. Cir. 1980), also cited by respondent (Br. 13), but in any event it is an Exemption 6 case decided by the same circuit that issued the opinion in the present case.

Respondent correctly states (Br. 18) that *Stern* v. *Richardson*, 367 F. Supp. 1316 (D.D.C. 1973), represented what the sponsors of the 1974

In this case, the information at issue should be exempt from mandatory disclosure to respondent for the same reason it unquestionably would be exempt if respondent had requested the agency document from which the information was derived—protection of the personal privacy of individual citizens. Any difference in treatment between the two situations would be wholly unresponsive to the important concerns that underlie Exemption 7(C) and would resurrect the "woode[n] and mechanica[l]" approach to Exemption 7 (see *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978)) that Congress condemned in the 1974 amendments.

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amendment to Exemption 7 believed to be a proper construction of the exemption, but *Stern* has no pertinence to the issue here. In *Stern*, the district court rejected the exemption claim because it found no proof of harm to any interest the government could legitimately protect. In this case the district court found that disclosure of the documents requested by respondent *would* harm the personal privacy interest embodied in Exemption 7(C).

Finally, respondent (Br. 12) and Amicus Clearinghouse (Br. 8) err in asserting that the government's position in this case is at odds with the analysis of Exemption 7 in the *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (1975). That Memorandum does, indeed, state (*id.* at 6-7) that the threshold Exemption 7 test is distinct from the question whether disclosure would harm protectible interests, *i.e.*, that "[o]nce it is determined that a request pertains to 'investigatory records compiled for law enforcement purposes,' the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7." But we do not argue to the contrary here. We contend only that in examining a record to determine whether the threshold test is met, a court may consider whether the record was copied virtually verbatim from documents generated in a law enforcement investigation. The test, as explained in the *Attorney General's Memorandum* (*id.* at 6; emphasis added), is whether the recorded material "*reflect[s] or result[s] from* investigative efforts" into civil or criminal enforcement matters.

2. Amicus Clearinghouse erroneously contends (Br. 9) that we take issue with the proposition, stated in *Forsham* v. *Harris*, 445 U.S. 169, 185 (1980), that the FOIA "deals with 'agency records,' not information in the abstract."[2] Rather, we simply note that a "record" is not always synonymous with the physical document that contains it. A single document might contain records, or memorializations, of several different matters; and, by the same token, a single matter might be identically memorialized in two or more separate documents—by photocopying, copying by hand, or the like. We have used the term "information" to refer to that which is recorded; but our argument that information does not necessarily lose its exempt status upon transfer from one document to another may be alternatively stated as an argument that a record copied from one document into another document does not necessarily, for purposes of every FOIA exemption, become a different "record."

3. There is no merit to the suggestion of Amicus Clearinghouse (Br. 17) that the determination whether information was derived from an exempt source would be unduly onerous. The agency is likely to know the source from which it has copied sensitive information, and if it is unaware whether that information was, at some remote

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[2]This quotation is wrenched out of context. The Court in *Forsham* was concerned with an FOIA request for information that was not part of *any* "agency records"; hence, the court had no occasion to focus on the question presented here. Even so, as we note in the text, the Court's statement in *Forsham* is consistent with the government's construction of the FOIA in this case. The fact that "information," to be disclosable under the Freedom of *Information* Act, must be within an "agency record," does not mean that the focus of disclosure inquiries under the Act must be on indivisible documents rather than the information they contain. Indeed, as we noted in our opening brief (Br. 20), the requirement in the Act that "[a]ny reasonably segregable portion of a record" be disclosed compels the opposite conclusion.

point, derived from documents assembled in a law enforcement investigation, it will have no reason to invoke Exemption 7 pursuant to the theory presented here. The issue arises only when the agency knows that a record contains information copied from documents created or assembled in a law enforcement investigation and that the reasons for protecting the information from disclosure still exist.

The agency, of course, bears the burden of persuading the court, with respect to any information it wishes to withhold under Exemption 7, that (a) the information is identical in substance to the information that was compiled for law enforcement purposes in the source documents and (b) its disclosure will produce one of the six specific harms listed in Exemption 7. This claim can be substantiated either by affidavit or by the court's in camera inspection. See 5 U.S.C. 552(a)(4)(B). By comparing the documents from which the information was taken and the documents at issue, a court can, without undue difficulty, determine whether the information is the same as that collected in the original investigation. Proof of the existence of a current threat to one or more of the six specific interests protected by Exemption 7 would, of course, be presented in the same manner as in any Exemption 7 case. The facts in this case belie any notion that courts would be unable to trace requested records to their law enforcement source.

4. Respondent (Br. 7 n.4, 22) and Amicus Clearinghouse (Br. 5 n.2, 13-14) suggest that the court of appeals held that even *photocopies* of records compiled for law enforcement purposes—here, name check summaries compiled in response to White House requests made in previous administrations for legitimate security or background investigations and other records from FBI files (see page 6, note 3, *infra*)—lose their exempt status if they are attached to other documents that are not exempt. Respondent and amicus curiae also imply that the court of appeals erred if it did not so hold. We believe that this is an incorrect reading

of the court of appeals' opinion; and, of course, respondent, having failed to file a cross-petition, may not now attack the judgment on the ground that it does not go far enough.

We agree that there may have been some misunderstanding in the court of appeals when government counsel sought to distinguish the name check summaries prepared by the FBI in response to Mr. Ehrlichman's request from attachments to those summaries. It may be that the court of appeals was unaware that some of the name check summaries had simply been photocopies from existing FBI files when the Ehrlichman request was made. As Amicus Clearinghouse correctly notes (Br. 5), the court of appeals did not examine any of the records at issue.[3]

It seems apparent, however, that the court of appeals held only that name check summaries prepared in response to the Ehrlichman request (using information taken from FBI files) failed to meet the Exemption 7 threshold test—not

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[3]It is the government's view that the "attachments," as to which we may seek to prove Exemption 7 status on remand, include all photocopies of FBI file records that existed before the Ehrlichman request and that were attached to the summaries prepared in response to his request. These included copies of both earlier name check summaries and other records from FBI files.

FBI Agent Donohoe explained in his second affidavit (J.A. 18-19) that he had "determine[d] the exact origin of each segment of information being withheld" and that all such "information had been originally obtained by the FBI either 'in an inquiry regarding an individual being considered for appointment to office' or 'to determine if there had been a violation of Federal criminal law and/or to obtain information leading to the arrest and conviction of any person or persons committing any such violation.' " It may be that this brief statement did not fully alert the court of appeals to the fact that some of the name check summaries at issue, which were attached to brief 1969 summaries, had been prepared in earlier years, in response to White House inquiries with respect to appointments, and that the government predicated its Exemption 7 status claim as to these documents on the original reason for their preparation.

that *photocopies* of name check summaries existing in FBI files prior to the Ehrlichman request lost their exempt status by virtue of their *attachment* to new summaries. Thus, the court of appeals took note (Pet. App. 10a) of the district court's finding that, in view of the political context in which the 1969 Ehrlichman request was made, it was not shown "that the information was compiled for law enforcement rather than [for] political purposes." But even if that assumption were true, the name check summaries prepared in response to White House requests in earlier years, as well as the other FBI file records attached to the summaries written in response to the Ehrlichman request, were not prepared in the political context that concerned the district court. And it would appear from the court of appeals' discussion of "attachments" (Pet. App. 20a-22a) that it did not believe that a document that was protected in whole or in part by Exemption 7 would lose its exempt status by virtue of its mere attachment to documents compiled for purposes other than law enforcement. The court of appeals, therefore, remanded for a finding "whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original, footnote omitted).

5. Finally, contrary to respondent's contention (Br. 15), we are not asking the Court to "create a new privacy exemption," nor (contrary to the assertion of Amicus Clearinghouse (Br. 16)) are we seeking merely the equivalent of a reinstatement of the Exemption 6 claim that the FBI made in its original response to respondent's FOIA request but failed to assert in court.

It may have been unwise to abandon reliance on Exemption 6, but the fact remains that Congress extended stronger protection for personal privacy in Exemption 7(C) by requiring the government to show only that disclosure would produce "an unwarranted invasion of personal privacy" rather than a "clearly unwarranted invasion," as must be shown when invoking Exemption 6. See *Department of the Air Force* v. *Rose*, 425 U.S. 352, 379 n.16 (1976); *Deering Millikin, Inc.* v. *Irving*, 548 F. 2d 1131, 1136 n.7 (4th Cir. 1977). The government believed that it was entitled to have its withholding tested under that less restrictive standard because the material that was responsive to respondent's request and that the FBI wished to withhold was of an investigatory character and had been compiled for law enforcement purposes.[4]

In sum, the government seeks only to assert an Exemption 7 claim that logically applies in this case and that was erroneously rejected by the court of appeals on a simplistic analysis that failed to consider the history and purposes of the FOIA or the strong privacy interests protected by Exemption 7(C). Indeed, as we pointed out in our opening brief (Br. 26), the court of appeals' holding turns Exemption 7(C) on its head: because the district court found the records in this case to be a response to a politically motivated internal government request for information about the personal lives of certain private individuals, those records (although composed of previously exempt, sensitive information) must be made publicly available to anyone who requests to see them. Congress, in enacting Exemption 7, could not have intended such an ironic result.

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[4]We note in addition that Exemption 6 claims have received a grudging treatment in the District of Columbia Circuit because of the strict "similar files" test imposed by that court. See, *e.g.*, *Washington Post Co.* v. *Department of State*, 647 F. 2d 197 (1981), cert. granted, No. 81-535 (Nov. 9, 1981); *Sims* v. *CIA*, 642 F. 2d 562 (1980); *Simpson* v. *Vance*, *supra*; *Board of Trade* v. *CFTC*, 627 F. 2d 392 (1980).

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1735

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners,

v.

HOWARD S. ABRAMSON,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF *AMICUS CURIAE*

The Freedom of Information Clearinghouse is a non-profit organization which was founded in 1972 to assist members of the public and the press in the effective use of the Freedom of Information Act ("FOIA") and other laws granting a right of access to government-held information. The Clearinghouse collects and disseminates information by mail and through speeches, conferences, articles, and testimony before Congressional committees concerning the public's right of access. For persons without a significant financial stake in securing information, it is one of

the few organizations to which [illegible] experienced legal assistance to pursue their right of access in court.

The Clearinghouse is appearing as *amicus curiae* in support of the respondent in this case, with the written consent of the parties, because it believes that the position urged by the Government will seriously undermine the availability of records under the FOIA. The Clearinghouse has represented a number of individuals who have sought access to records which agencies attempted to withhold under Exemption 7 of the Freedom of Information Act, 5 U.S.C. § 552(b)(7), which protects "investigatory records compiled for law enforcement purposes" to the extent that one of six specific harms can be demonstrated. In addition the Clearinghouse offered its technical assistance to Congressional committees which redrafted the FOIA into its current form in 1974 and litigated one of the cases in the D.C. Circuit which Congress overruled in its 1974 amendment to Exemption 7.

STATEMENT

In this case respondent Howard S. Abramson, a professional journalist, is seeking access under the Freedom of Information Act to the deleted portions of certain "name check" summaries and other documents which the FBI submitted to the White House in 1969 in response to a request from White House aide John D. Ehrlichman for information concerning 11 specified individuals (J.A. 29-36).

This case began in 1976 when Abramson filed an FOIA request with the FBI seeking access to information "showing or indicating the transmittal of any document or information from the FBI to the White House, or any White

House aides, for the years 1969 and 1970" concerning eight named individuals. He also asked for copies of the original White House request to the Bureau and a memorandum dated October 6, 1969 from J. Edgar Hoover to John D. Ehrlichman "by which Mr. Hoover transmits 'memoranda' on several individuals to Mr. Ehrlichman" and all information transmitted therewith (Pet. for Cert. 4a-5a [hereinafter "Pet."]).

The Bureau answered that it would not search its files until Abramson had obtained notarized authorization from the individuals concerned, for otherwise the records could be exempt from disclosure on privacy grounds under the FOIA's Exemptions 6 and 7(C) (Pet. 5a).

Abramson, assuming his initial request had been too specific, filed a new request for all such information pertaining to elected officeholders transmitted between 1969 and 1974. This request was denied for failure to reasonably describe the records sought (Pet. 6a).

Abramson appealed both denials unsuccessfully and brought suit in the U.S. District Court for the District of Columbia in 1977 (Pet. 7a). After suit was filed, the Bureau reprocessed both requests and provided Abramson with 84 pages of documents, some intact and some with material deleted, principally on the basis of Exemption 7(C) (investigatory records compiled for law enforcement purposes to the extent that disclosure would constitute an unwarranted invasion of privacy) (Pet. 7a). However, for reasons nowhere explained in the record, the FBI no longer asserted that personal privacy would be invaded within the meaning of Exemption 6.

As the case progressed, Abramson decided to press for disclosure of only some of the deleted items, specifically, the items deleted from 64 pages of records known collectively as "Document No. 3" (Pet. 10a). Those documents consist of (1) a cover letter from J. Edgar Hoover to John

D. Ehrlichman dated October 6, 1969, which transmitted memoranda concerning 11 named individuals in response "to your name check request concerning Cesar Estrada Chavez and some other individuals" (J.A. 29); (2) the FBI's "name check" summaries on ten of the 11 individuals and, in the case of John Kenneth Galbraith at least, copies of earlier FBI summaries forwarded to the White House at its request (J.A. 31-32); and (3) a copy of an article written by John Kenneth Galbraith, a Vietnam Moratorium Committee advertisement in the New York Times (J.A. 33-36), and a typed list of certain individuals whose names appeared on that advertisement (J.A. 17).

The district court denied the FBI's first motion for summary judgment with respect to those items withheld under Exemption 7(C), noting that the Bureau had failed to show that the "records were compiled for 'law enforcement' rather than political purposes" (Pet. 33a).

The FBI then submitted a second affidavit (J.A. 13-27) and again moved for summary judgment. With respect to the Exemption 7(C) claim, the court found that there had been "absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden . . ." on that point (Pet. 27a). However, the district court held that disclosure of certain material would constitute an unwarranted invasion of personal privacy under clause (C) of Exemption 7 and entered judgment for the Bureau on that point (Pet. 28a).[1]

Respondent then appealed only the Exemption 7(C) ruling to the court of appeals, which concluded that the lower

[1]Certain paragraphs on two pages were deleted on Exemption 1 (classified records) grounds, and the court entered judgment for the FBI on this point (Pet. 27a). In addition Abramson did not challenge several deletions made on Exemption 7(D) grounds.

court had misapplied the exemption and held that privacy could be invoked to prevent disclosure under that Exemption only if the agency made a threshold showing that the records in question were in fact "investigatory records compiled for law enforcement purposes." Since the FBI had failed to make that showing, that was dispositive (Pet. 11a-18a).

A new issue emerged in the court of appeals, namely, the exempt status of certain "attachments" to the name check summaries. The court of appeals, which did not examine the records at issue in this case, was apparently concerned whether these "attachments" constituted the "*original documents* from the FBI files compiled prior to the White House request, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (Pet. 21a-22a) (emphasis in the original). The court remanded this issue to the district court to examine the contents of these "attachments" to see if they are exempt under Exemption 7(C) (Pet. 22a).[2]

SUMMARY OF ARGUMENT

The court of appeals correctly interpreted Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), as requiring an agency to make two separate showings to qualify a document for that Exemp-

[2]It is unclear exactly what documents the court of appeals thought constituted "attachments," *i.e.*, whether it meant the pre-1969 name check summaries previously sent to the White House, all records in Document No. 3 other than the name check summaries, or something else. Furthermore *amicus* understands that the litigants hold conflicting views on the interpretation of that ruling. *Amicus* has reviewed the FBI's affidavit specifying where deletions were made from the 64 pages in Document No. 3 which were disclosed to Abramson (J.A. 13-27), and it does not appear that any of the records from which deletions were made are raw FBI investigatory files.

tion: (1) is the requested record both "investigatory" and "compiled for law enforcement purposes"? and (2) if that threshold requirement is met, would disclosure of the record result in an "unwarranted invasion of personal privacy"? Because the Federal Bureau of Investigation failed to meet the threshold requirement in this case, the court of appeals correctly ruled that the requested records could not be withheld under Exemption 7(C).

The Bureau argues that the court of appeals erred because Congress intended to exempt "information" from disclosure under Exemption 7, even if that information is contained in a record which was not compiled for law enforcement purposes. This argument is rebutted by the plain meaning of the FOIA, which consistently uses the word "records" throughout and which, in Exemption 7, modifies the word "records" by requiring that they be compiled for a specific purpose, *i.e.*, law enforcement.

When, as here, information from records which are claimed to be exempt as law enforcement records is recompiled into a new record, that record must be examined on its own terms, without regard to where the information contained therein originated. If the new record is itself an "investigatory record compiled for law enforcement purposes," it may be withheld under Exemption 7. When the new record is not compiled for law enforcement purposes, however, Exemption 7 is not available, although the agency may still seek to avail itself of any of the other eight FOIA exemptions.

This approach is required by the language and intent of the FOIA and allows agencies to use Exemption 7 only when the records they seek to shield were prepared for law enforcement purposes. What the Bureau is arguing, in effect, is that this Court should create a general privacy ex-

emption under Exemption 7(C) broader than that created by Congress. Exemption 7(C) is available to protect privacy if the records in issue are "investigatory records compiled for law enforcement purposes." Exemption 6 protects a "clearly unwarranted invasion of privacy" when "personnel and medical files and similar files" are at issue. Since the FOIA has explicitly struck the balance between public access and personal privacy, this Court should not substitute its judgment for that of Congress.

ARGUMENT

The only issue in this case is whether Exemption 7 of the Freedom of Information Act allows an agency to withhold records which were compiled not for law enforcement purposes, but for political purposes.

Under Exemption 7(C), an agency may withhold "investigatory records compiled for law enforcement purposes, but only to the extent that production would. . . (C) constitute an unwarranted invasion of privacy . . . ." In the instant case, the court of appeals correctly held that since the FBI had failed to make the threshold showing that the records had been "compiled for law enforcement purposes," it could not withhold the document under Exemption 7.

In the only previous case in which this Court examined the language and history of Exemption 7, it noted that Congress had "carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). Exemption 7 is "carefully structured" to require a two-part inquiry: (1) are the records in issue both "investigatory" and "compiled for law enforcement pur-

poses"? and (2) if so, would disclosure result in one of the six harms specified in clauses (A) through (F) of that Exemption?

This was the interpretation urged on federal agencies by the Attorney General in his memorandum on how to implement the 1974 amendments to the FOIA:

> Once it is determined that [the threshold requirements] of "investigatory records" [and] "compiled for law enforcement purposes" [have been met], the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended Exemption 7.

Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 6-7 (Feb. 1975). This approach has been adopted in several Circuits. *See, e.g., Lesar v. U.S. Dep't of Justice,* 636 F.2d 472, 486 (D.C. Cir. 1980); *Committee on Masonic Homes v. NLRB,* 556 F.2d 214, 218 (3d Cir. 1977); *Rural Housing Alliance v. U.S. Dep't of Agriculture,* 498 F.2d 73, 80-81 (D.C. Cir. 1974); *Pope v. United States,* 599 F.2d 1383, 1386 (5th Cir. 1979); *but see Irons v. Bell,* 596 F.2d 468 (1st Cir. 1979); *Kuehnert v. FBI,* 620 F.2d 662 (8th Cir. 1980), discussed *infra* at pp. 11-12.

The Bureau argues that even though the 1969 name check summaries were not compiled for a law enforcement purpose, they are nonetheless exempt because they were drawn from legitimate law enforcement records and that this exemption "passes through" to any recompilation. The argument, differently stated, is that the court of appeals erred in limiting the scope of Exemption 7 to "documents" or "records" instead of the "information" which may be contained in them (Pet. Br. 15-22).

In addition to the plain meaning of Exemption 7's introductory phrase, this argument was answered by this Court last year in *Forsham v. Harris,* 445 U.S. 169, 185 (1980), where it observed that the FOIA "deals with 'agency records,' not information in the abstract."

The Bureau's argument is also directly contrary to the legislative history of the 1974 FOIA amendments, in which Congress limited Exemption 7 only to "records" and then only if one of six specified harms could be proven. In its original version, Exemption 7 allowed withholding of "investigatory *files,*" Pub. L. No. 89-487, 80 Stat. 251 (emphasis added). Early cases which interpreted this exemption applied a "harm" analysis, asking whether the disclosure of particular records would actually impede law enforcement efforts by exposing secret investigative techniques, or by interfering with enforcement proceedings in some specific way. *See, e.g., Bristol-Myers Co. v. FTC,* 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970); *Wellford v. Hardin,* 444 F.2d 21, 23-24 (4th Cir. 1971).

Beginning in 1973, however, a series of cases from the D.C. Circuit departed from this approach and held that Exemption 7 was applicable *per se* as long as the requested records were contained in a properly designated "investigatory file." *See Weisberg v. Dep't of Justice,* 489 F.2d 1195 (D.C. Cir. 1973) *(en banc), cert denied,* 416 U.S. 993 (1974); *Aspin v. Dep't of Defense,* 491 F.2d 24 (D.C. Cir. 1973); *Ditlow v. Brinegar,* 484 F.2d 1073 (D.C. Cir.), *cert. denied,* 419 U.S. 974 (1974); *Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger,* 502 F.2d 370 (D.C. Cir. 1974).

These cases were decided after the Senate Judiciary Committee had prepared a bill which made comprehensive

changes in the FOIA, though not in Exemption 7. When that bill reached the Senate floor, the D.C. Circuit's cases interpreting Exemption 7 were sharply criticized by Senator Hart as erecting:

> a stone wall . . . . The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966.

House Comm. on Government Operations & Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents* 332-33, 94th Cong., 1st Sess. (Jt. Comm. Print)(1975)(remarks of Senator Hart)(hereinafter *1975 Source Book). See also id.* at 335 (remarks of Senator Kennedy).

On the floor, Senator Hart introduced an amendment to limit the scope of Exemption 7 and thereby overrule the D.C. Circuit cases. His amendment had two key features: (1) the phrase "investigatory files" was narrowed to "investigatory records," and (2) such "investigatory records" could be withheld only if the agency could prove that disclosure would result in one or more of six enumerated harms now specified in the Exemption. As this Court observed in *Robbins Tire, supra,* after reviewing the history of this amendment, Congress's aim was "to avoid the possibility of impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential." 437 U.S. at 229-30. This Court further observed that by requiring an agency to cite the specific harms which could flow from disclosure, the "'wooden[] and mechanical[]' approach

taken by the D.C. Circuit and disapproved by Congress would thereby be eliminated." *Id.* at 230.

This legislative history also makes clear that the proper starting point in Exemption 7 cases is the "record" being requested and not the nature of the agency, as several cases cited by the Bureau (Pet. Br. 26-27) seem to hold. *Irons v. Bell, supra; Kuehnert v. FBI, supra.*

These cases misread the words of the statute and overlook Congress's intent to limit disclosure under Exemption 7 to cases where disclosure of particular *records* would cause harm, regardless of the duties of the agency in question. Indeed, on the Senate floor, the Hart amendment was opposed on almost the very ground adopted in these decisions — that the FBI's files are "for one purpose only, and that is a law enforcement purpose." *1975 Source Book* at 341 (remarks of Senator Hruska).

This unsuccessful opposition demonstrates quite clearly that the fact that the FBI is a law enforcement agency and the fact that most of its records are compiled for law enforcement purposes is only the beginning of the inquiry.

Indeed, Congress intended the phrase "investigatory records compiled for law enforcement purposes" to be quite narrow and not to include, for example, all FBI records. Thus at the time of the 1974 amendments, Congress was well aware of the fact that records of investigatory agencies might not be "compiled for law enforcement purposes," and supporters of the amendment to Exemption 7 made it clear that any such records should not be withheld under Exemption 7. For example, Senator Kennedy, the floor manager of the 1974 amendments stated:

> . . . In the case where NBC newsman Carl Stern [367 F. Supp. 1316 (D.D.C. 1973)] took the FBI to court to obtain documents relating to counterintelligence programs, the Bureau took

the position that those documents were "investigatory files." The FBI argued this point strongly, but a Federal Judge even more forcefully found it lacking in substance. The judge responded:

"The government has not demonstrated that the requested records, which are couched in broad generalities, relate to any ongoing investigation or that disclosure would jeopardize any future law enforcement proceedings."

No doubt this is just the kind of document — revealing a program that earlier this week the Justice Department itself characterized as involving "practices that can only be considered abhorrent in a free society" — that the FBI would find impractical to review and unlikely to be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about.

1975 Source Book at 440.

If Congress wanted the FOIA to protect law enforcement agencies, it could have written the statute to do just that, as it did in the general exemption section of the Privacy Act, 5 U.S.C. § 552a(j)(2), which Congress passed at the same time as the 1974 FOIA amendments (general exemption for records "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws . . ."). That it did not do so further evidences the error of the FBI's contentions.

Although the FOIA's Exemption 7 says "records," the Bureau argues that Congress intended to protect "information" from disclosure and claims that the court of ap-

peals' decision produces an absurd result. It argues that photostatic copies of an investigatory record would remain exempt under Exemption 7, while information in such records which is later summarized in a new document would lose its exempt status. Such a distinction, the Bureau asserts, "makes no sense in light of either the disclosure purposes of the FOIA or the purposes of the exemption at issue here" (Pet. Br. at 21).

To the contrary, limiting Exemption 7 to "investigatory records" and not the "information" derived from them makes sense for a variety of reasons and is consistent with what Congress intended in the FOIA. The principal reason is that the key phrase in Exemption 7 for this case is "compiled for law enforcement purposes." *Amicus* believes that when an agency summarizes documents from its files, it is "compiling" a new record, and the pertinent question for purposes of Exemption 7 becomes "is this new record being compiled for law enforcement purposes?" Applying this analysis to the instant case, for example, when the FBI in 1969 wrote a new name check summary regarding John Kenneth Galbraith, photocopied earlier summaries and fastened them together for transmission to the White House (J.A. 32), it was "compiling" a new record. If this new document was compiled for a law enforcement purpose, *e.g.*, a White House security clearance, then every part of this compilation would meet the threshold test for withholding under Exemption 7. If, however, the new record was not compiled for a law enforcement purpose, as the district court found in this case, then no part of that new compilation could be withheld under Exemption 7.

Such an approach is supported by the decision of this Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), in which an admittedly exempt document lost its

status when it was incorporated into a federal agency decision which was required to be made public. Similar rulings have also been made by other courts in other similar circumstances. *See e.g., Niemeier v. Watergate Special Prosecution Force,* 565 F.2d 967 (7th Cir. 1977); *Simpson v. Vance,* 648 F.2d 10 (D.C. Cir. 1980).

At a minimum, *amicus* suggests that the court of appeals' interpretation "makes sense" even if this Court concludes that only summaries and not photostatic copies of original records can be "compiled" within the meaning of Exemption 7. Under this analysis the name check summaries which were prepared in 1969 were "compiled" for political purposes and are not exempt under Exemption 7. This analysis leaves open, however, the question of whether *pre-1969* name check summaries (such as the ones prepared on John Kenneth Galbraith, which were presumably copied from the files and fastened to the 1969 summary) were "compiled for law enforcement purposes" at the time they were written in 1961 and 1965 (J.A. 32). If they were – and the record is not clear on this point (Pet. Br. 29) – then only the 1969 summaries are disclosable in their entirety at this stage of the proceedings, and the issue of whether these earlier summaries were properly "compiled for law enforcement purposes" should be resolved on remand.

These interpretations not only effectuate the plain meaning of Exemption 7 and its legislative history, but they also have the effect of putting an agency on notice that the only way to safeguard its investigatory records is to ensure that these records are, in fact, compiled and used for law enforcement purposes. This interpretation thus takes into consideration the concern expressed in Congress during the 1974 debate about past "abuses" by law enforcement agencies and the fact that "case after case after case after case has been thrown out because the law en-

forcement and intelligence communities acted illegally." *1975 Source Book* at 348 (remarks of Senator Weicker). *See also id.* at 440 (remarks of Senator Kennedy, quoted *supra* at 11-12). Although it was observed that the Hart amendment would make the job of the FBI and similar agencies more difficult, Senator Weicker added that "the far greater danger lies behind closed doors and in locked files." *Id.* at 346.

It is also important to note that even if a record loses its status under Exemption 7, it may possibly be withheld under another Exemption. Thus, the court of appeals' analysis "makes sense" even when applied to the two examples given by the FBI to illustrate the alleged "seriousness of the potential problem" if the judgment is affirmed (Pet. 16-17).

The FBI notes that it sends information to the State Department where the data may be included in documents used to process visa applications or else be sent to U.S. embassies to reassure foreign governments that they are dealing with reputable U.S. business people (Pet. 16-17). It may be true that the recompilations are no longer exempt as law enforcement records, but they may be protected from disclosure on other grounds. For example, government-to-government communications are frequently classified and thus may be withheld under Exemption 1. It is also possible that the new records may be withheld under Exemption 5, which deals with interagency memoranda, or under Exemption 6, which protects "personnel and medical files and similar files" involving a "clearly unwarranted invasion of personal privacy."

As for summaries of FBI records on criminal activities which are sent to Congressional committees (Pet. 17), it is possible that the summaries are themselves "compiled for

law enforcement purposes" and non-disclosable under Exemption 7 if they are provided to help Congress oversee the administration of criminal laws. Indeed, in one Exemption 5 case, it was held that internal agency records remained exempt even after being disclosed to a Member of Congress. *Murphy v. Dep't of the Army,* 613 F.2d 1151 (D.C. Cir. 1979).

The real problem in this case is that the FBI is attempting to assert that personal privacy should be protected under Exemption 7(C), even though the records were not compiled for law enforcement purposes. Under the circumstances, a privacy claim should be made, if at all, under Exemption 6. For reasons not entirely clear to *amicus,* the Bureau raised Exemption 6 when respondent made his first FOIA request but chose not to rely upon it thereafter. By litigating the case in this fashion, the Bureau put itself in a position where it must ask this Court to construe Exemption 7(C) as a general privacy exemption. Such a holding would be contrary to the plain meaning of the statute and Congress's intention that the exemptions be considered exclusive and construed narrowly. *Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976).

In other cases, this Court and others have confined themselves to construing only the particular exemptions raised by the parties, leaving to the district courts the task of determining whether other exemptions may also bar disclosure. In *NLRB v. Sears, Roebuck & Co., supra,* this Court determined the availability of certain records under Exemption 5 and remanded for a determination as to the applicability of Exemption 7. Similarly, in *Sims v. CIA,* 642 F.2d 562 (D.C. Cir. 1980), the only issue decided was whether the CIA could withhold certain records under Exemptions 3 and 6; the court resolved those claims while

noting that its decision did not address the availability of the documents under Exemption 1, which the agency had not asserted. In *Simpson v. Vance, supra,* 648 F.2d at 17, the State Department sought to protect records on Exemption 6 and not Exemption 1 grounds. The court refused to expand Exemption 6 to "fit a square peg in a round hole," as sought by the Government there and, we submit, here.

Finally, there is a very practical reason for upholding the court of appeals decision that Exemption 7 protects "records" and not "information." If this Court were to rule that "information" is what Congress sought to withhold and that Exemption 7 (or any other exemption, for that matter) passes through when exempt "information" is recompiled into another record, the FOIA would become administratively unworkable. Upholding the FBI's position would permit agency employees to claim not only that the record is exempt at the time of the request, but also that some of the "information" contained in it (however "information" is defined) came from another document where it might have been exempt. Such a holding would not only impose a crushing burden on courts when agencies seek to withhold records under Exemption 7, but it would also frustrate Congress's intention that the FOIA provide strict guidelines specifying when certain records can be withheld. The difficulty which an agency (as well as a reviewing court) can have in assessing whether information was derived from properly exempt material is illustrated in *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975).

In short, the court of appeals correctly held that since it is undisputed that the name check summaries and other documents were not compiled for law enforcement purposes, petitioners cannot continue to withhold the deleted portions of them. This decision gives effect to the plain

meaning of Exemption 7, the pro-disclosure thrust of the FOIA, and the legislative history of the 1974 FOIA amendments. This Court should not engraft onto Exemption 7 a general privacy exemption or stretch this Exemption beyond the boundaries established by Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Brief Amici Curiae of The Society of Professional Journalists, Sigma Delta Chi; The American Society of Newspaper Editors; The National Association of Broadcasters; The National Newspaper Association; The Radio-Television News Directors Association; and The Reporters Committee for Freedom of the Press in Support of Respondent.

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No. 80-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL BUREAU OF INVESTIGATION and the UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners,

v.

HOWARD S. ABRAMSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief Amici Curiae of The Society of Professional Journalists, Sigma Delta Chi; The American Society of Newspaper Editors; The National Association of Broadcasters; The National Newspaper Association; The Radio-Television News Directors Association; and The Reporters Committee for Freedom of the Press in Support of Respondent.

INTEREST OF AMICI CURIAE

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. It is, in fact, the largest, oldest, and most representative organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business be conducted in public and to keep governmental records open to public inspec-

tion. Members of the Society regularly prepare news reports based on documents available under the Freedom of Information Act ("FOIA"), including reports about how the federal government works.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The Radio-Television News Directors Association ("RTNDA") is a non-profit professional organization of journalists, many of whom have used the FOIA to obtain government records for news purposes. The Association has participated in legislative proceedings

concerning both the federal Act and the state law on the subject of access to government information. RTNDA includes approximately 1,700 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case that has been litigated since 1970.

If the decision of the Court of Appeals is not affirmed the membership of these *amici* will be adversely affected in their ability to report on and criticize the performance of government.

SUMMARY OF ARGUMENT

For the past fifteen years, the public has been able to scrutinize the conduct of American government through the assurances of openness granted by the FOIA.

Exemption 7(C) of the FOIA, 5 U.S.C. § 552(b)(7)(C), exempts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy." Petitioner Federal Bureau of Investigation ("FBI") seeks, in this case, judicial expansion of this exemption to shield from public scrutiny any inform-

ation concerning an identifiable person ever acquired by a federal agency in fulfillment of a law enforcement mission. It seeks judicially what it has unsuccessfully sought legislatively. Couched in terms of technical statutory interpretation, the FBI's argument would, if adopted, have far-reaching implications for the viability of the FOIA. Under the FBI's construction of Exemption 7(C), any federal agency could deny the public access to information gathered for law enforcement purposes by public servants, at public expense, for the public's welfare but long since put to uses unrelated to law enforcement.

The Court of Appeals recognized that such a construction is supported neither by the legislative history of the FOIA nor by the repeated instances of agency noncompliance with the law that led Congress to amend the Act in 1974. The Court of Appeals decision should be affirmed in order to assure the public the news reports about its government necessary for an informed electorate.

ARGUMENT

THE COURT OF APPEALS DECISION PRESERVES THE FREEDOM OF INFORMATION ACT AS A MEANINGFUL VEHICLE THROUGH WHICH THE PRESS AND PUBLIC CAN SECURE ACCESS TO GOVERNMENT INFORMATION.

In this case, the FBI seeks to broaden significantly the number of government documents exempt from disclosure under the FOIA.[1] *Amici* urge this Court to reject this unprecedented construction of the FOIA and preserve the original legislative purpose of the statute—to augment the public's confidence in government by ensuring public accountability.

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[1] 5 U.S.C. § 552 (1976).

Enacted fifteen years ago by a bi-partisan coalition in Congress, the FOIA was designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); *see* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The Act promotes meaningful access to information of public interest by creating a broad presumption that government information is public information. *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). Unless expressly exempted from disclosure by the statute, government records must be made "promptly available to any person." 5 U.S.C. § 552 (a)(3).

Like historians and scholars, journalists were perceived by the FOIA's framers as uniquely well-situated to ensure that the Act fulfills its promise. Under the FOIA, journalists function as the "conduit by which citizens learn about government." *Hearings Before the Subcomm. on Government Information & Individual Rights of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (July 14, 1981) (testimony of Bob Schieffer, CBS News Correspondent, on behalf of the Society of Professional Journalists, Sigma Delta Chi) [hereinafter cited as *1981 FOIA Hearings*]. As Chief Justice Burger noted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980), journalists serve as "surrogates for the public" in obtaining information about government.

Discharging that duty, the press has used the FOIA methodically since 1966 to gain access to a wide range of government information. As a consequence, news reports have informed citizens about such public issues as the pervasive role of organized crime in the Amer-

ican coal industry,[2] the chronic failure of small businesses to pay federal income taxes,[3] and lax security measures at many nuclear facilities.[4] The press has gathered newsworthy information from all corners of the federal bureaucracy under the FOIA—from the Securities and Exchange Commission[5] and the Internal Revenue Service[6] to the Nuclear Regulatory Commission[7] and the FBI.[8] These representative news reports, and many others, may well not have been published if Exemption 7(C) of the FOIA were given the construction urged by the FBI in this case.

On its face, Exemption 7(C) permits government agencies to withhold "investigatory records compiled for law enforcement purposes" to the extent that dis-

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[2] *See* Ky. Post, May 31-June 19, 1980.

[3] *See* N.Y. Times, July 21, 1975, at 31, col. 6.

[4] *See id.*, Mar. 30, 1975, at 32, col. 2. For a study of 250 major news articles based on information disclosed under the FOIA, *see* Congressional Research Service, *Press Notices on Disclosures Made Pursuant to the Freedom of Information Act, 1972-1980: A Compilation* (Feb. 27, 1981).

[5] *See* Ky. Post, May 31, 1980, at 8K, col. 3.

[6] *See* N.Y. Times, July 21, 1975, at 31, col. 6.

[7] *See id.*, Mar. 30, 1975, at 32, col. 2.

[8] *See id.*, Nov. 24, 1976, at 13, col. 4. The FOIA is used not only by large news organizations with operations in Washington, but also by local news media throughout the nation to report on the impact of governmental decisionmaking. *See, e.g., Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (July 15, 1981) (testimony of Ted Capener, Vice-President, News and Public Affairs, Bonneville Broadcasting Corp., on behalf of the Society of Professional Journalists, Sigma Delta Chi) (examples of use of FOIA by journalists in Utah).

closure would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In the instant case, the FBI contends that information originally gathered for law enforcement purposes and exempt from disclosure under Exemption 7(C) is also exempt when the government incorporates the information into other documents compiled for purposes wholly unrelated to law enforcement. *See* Brief of Petitioners at 14-22. Under this construction, any federal agency may effectively withhold information relating to an identifiable person if it was once compiled for law enforcement purposes. *See id.* So construed, Exemption 7(C) engulfs the FOIA, effectively denying the public access to law enforcement information gathered for one purpose and used by the government for an unrelated purpose.[9]

The sweep of the FBI's reading of Exemption 7(C) bestows upon almost every federal agency broad discretion to withhold from FOIA disclosure some of the most telling information about government operations.

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[9] Although the FOIA provides that any "reasonably segregable" portion of a requested record shall be disclosed, 5 U.S.C. §552(b), the FBI's construction of Exemption 7(C) would apply broadly to prevent disclosure of any information originally compiled for law enforcement purposes that relates to an identifiable person, *see* Brief of Petitioners at 14-22. In this context, the safeguard of "segregation" is of little or no value since those portions of requested documents that deal with information of public interest constitute the precise information that falls within the FBI's construction of Exemption 7(C). Indeed, much information made public about the FBI through the FOIA has "revealed improper, possibly unlawful, and certainly embarrassing conduct by the agencies." 1981 FOIA Hearings (July 14, 1981) (testimony of Edward Cony, Vice-President for News, Dow Jones Publishing Co., on behalf of the American Society of Newspaper Editors).

Exemption 7(C)'s requirement that the requested document constitute an "investigatory record compiled for law enforcement purposes" can be met not only by the FBI, *see Irons* v. *Bell*, 596 F.2d 468, 472 (1st Cir. 1979), but also by many other federal agencies that perform both administrative and law enforcement functions, *see, e.g., Forrester* v. *Department of Labor*, 433 F.Supp. 987, 988 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 1330 (2d Cir. 1978).

To claim the exemption, as construed by the FBI, an agency with "mixed" functions, encompassing both administrative and law enforcement responsibilities, must demonstrate only that it was acting within its sphere of enforcement authority in compiling the information requested under the FOIA. *See Irons, supra*, 596 F.2d at 473. Thus, courts have regularly applied Exemption 7 to "mixed" agencies. The Federal Trade Commission,[10] the Commodity Futures Trading Commission,[11] the National Highway and Traffic Safety Administration,[12] the Securities and Exchange Commission,[13] the Department of Labor,[14] the Equal Em-

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[10] *See, e.g.*, Amolsch & Madden, Inc. v. FTC, 591 F.2d 809, 811 (D.C. Cir. 1978); Fedders Corp. v. FTC, 494 F.Supp. 325 (S.D. N.Y. 1980).

[11] *See, e.g.*, Hunt v. Commodity Futures Trading Comm'n., 484 F.Supp. 47, 50 (D.D.C. 1979).

[12] *See, e.g.*, Firestone Tire & Rubber Co. v. Coleman, 432 F.Supp. 1359, 1368-69 (N.D. Ohio 1976).

[13] *See, e.g.*, OKC Corp. v. Williams, 489 F.Supp. 576, 586 (N.D. Tex. 1980).

[14] *See, e.g.*, Forrester v. Department of Labor, 433 F.Supp. 987, 988 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 1330 (2d Cir. 1978); T.V. Tower, Inc. v. Marshall, 444 F.Supp. 1233, 1236 (D.D.C. 1978).

ployment Opportunity Commission,[15] and the Interstate Commerce Commission[16] have all withheld information pursuant to Exemption 7 of the FOIA. Even those courts that have denied claims by "mixed" agencies pursuant to Exemption 7(C) have held the exemption inapplicable only after scrutinizing the purpose for compiling the records in question.[17] Not one of these disclosure orders was based on a finding that the agency did not perform law enforcement functions.

Thus, the FBI's construction of Exemption 7(C) would exacerbate the two greatest obstacles to effective use of the FOIA by the press and public: expense and delay. Although the 1974 Amendments to the FOIA theoretically require agencies to respond to a request within ten working days, *see* 5 U.S.C. § 552(a)(6)(A), requesters must routinely incur the considerable expense and delay inherent in the Act's administrative and judicial review provisions, *see id.* § 552(a)(6)(A)-(C).[18] Agencies have become expert at the art of

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[15] *See, e.g.*, Charlotte-Mecklenburg Hosp. Auth. v. Perry, 571 F.2d 195, 201-03 (4th Cir. 1978).

[16] *See, e.g.*, Zeller v. United States, 467 F.Supp. 487, 501 (E.D. N.Y. 1979).

[17] *See, e.g.*, Gregory v. Federal Deposit Ins. Corp., 470 F.Supp. 1329, 1333-34 (D.D.C. 1979); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 869 (D.C. Cir. 1980); Founding Church of Scientology v. Miller, 490 F.Supp. 144, 147 (D.D.C. 1980) (Treasury Department); Education/Instruccion, Inc. v. Department of Hous. & Urban Dev., 471 F.Supp. 1074, 1078 (D. Mass. 1979); *cf.* Church of Scientology v. Department of Defense, 611 F.2d 738, 748-49 (9th Cir. 1979) (remanded to determine law enforcement purpose).

[18] Not every dilatory response to an FOIA request signals a government attempt to hide official mistakes and malfeasance. Many

selecting a plausible FOIA exemption that arguably applies to requested information,[19] thereby ensuring that information will not be disclosed until months or even years after the original request.[20] A 1978 FOIA request by the *Miami Herald,* for example, is still pending in the United States Court of Appeals for the Fifth Circuit, even though a federal district court ruled in 1980 that the Small Business Administration erroneously withheld the requested information. *See Miami Herald Publishing Co.* v. *Small Business Administration,* No. 79-1624-CIV-JE (S.D.Fla. July 1, 1980). In an era when little if any news remains timely three years after the fact, the *Herald* has nevertheless

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of the delays have resulted from no more than "the bureaucratic reverence for secrecy . . . as old as ancient civilization when Roman soldiers returning from battle were prohibited from informing the citizens of their occasional defeats." *Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (July 15, 1981) (testimony of Steven R. Dornfeld, Knight-Ridder Newspapers, on behalf of the Society of Professional Journalists, Sigma Delta Chi).

[19] The case before the Court aptly illustrates the use and consequences of this tactic. The FBI's initial denial of Respondent's June 1976 request asserted that Exemption 6, 5 U.S.C. § 552(b)(6), authorized the FBI to withhold the requested materials, *see* Brief of Petitioners at 4. Subsequently, the FBI has not advanced this assertion, yet it is the device by which the Bureau forced Respondent to institute litigation.

[20] *See Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs,* 96th Cong., 2d Sess. 120 (1980) (testimony of Jack Landau, The Reporters Committee for Freedom of the Press) [hereinafter cited as *1980 FOIA Hearings*]. In the instant case, Respondent first requested the information withheld by the FBI in 1976. *See* Brief of Petitioners at 3.

paid some $45,000 in legal fees. *See 1980 FOIA Hearings* at 119 (testimony of K. Prescott Low, Quincy (Mass.) Patriot-Ledger, on behalf of the American Newspaper Publishers Association). The *Herald's* experience has been shared by many news organizations that seek access to information under the FOIA. *See, e.g., Philadelphia Newspapers, Inc.* v. *Department of Justice,* 405 F.Supp. 8 (E.D. Pa. 1975); *1980 FOIA Hearings* at 54 (testimony of Katherine A. Meyer, Freedom of Information Clearinghouse).

If the FBI's construction is adopted by this Court, government agencies can and no doubt will claim that Exemption 7(C) applies to every document they wish to withhold from public scrutiny. So long as a document contains some information that was once compiled for law enforcement purposes and concerns an identifiable person, Exemption 7(C) would arguably render it immune from disclosure.[21] Even if a judge ultimately holds that the Exemption was erroneously invoked and the information is eventually released, the agency will have succeeded in deferring public scrutiny of its conduct. Deferral of the quest for information often equals deterrence because "news quickly goes stale [and] commentary rapidly becomes irrelevant"

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[21] Although disclosure of law enforcement information about an identifiable person will not always, or even usually, constitute "an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), discussion of an individual will serve to trigger the Exemption in the first instance, with ultimate judicial resolution of the "privacy" issue deferred for months or even years, *see, e.g.,* Forrester v. Department of Labor, 433 F.Supp. 987, 989 (S.D.N.Y. 1977), *aff'd,* 591 F.2d 1330 (2d Cir. 1978); Lamont v. Department of Justice, 475 F.Supp. 761, 783 (S.D.N.Y. 1979) (court ordered release of "names of [requester's] associates where they are mentioned in a nonderogatory or public context" in FBI files).

to public debate. *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); *see Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 159 (1967) (plurality opinion of Harlan, J.) (recognizing "necessity for rapid dissemination" of matters of public interest). Indeed, the sheer cost of litigating the applicability of Exemption 7(C) will discourage many news organizations from even requesting information under the Act.[22]

As a practical matter, therefore, the FBI's construction of Exemption 7(C) all but exempts that agency, and many others, from the FOIA. Such a construction would accomplish what the FBI has thus far been unable to achieve, despite its diligent efforts, in Congress: amendments to the FOIA creating a blanket exemption for the agency. *See, e.g.*, S.2086, 96th Cong., 1st Sess. (1979); H.R. 5030, 96th Cong., 1st Sess. (1979); H.R. 5129, 96th Cong., 1st Sess. (1979); H.R. 7056, 96th Cong., 2d Sess. (1980).[23] In fact, the most recent legislative proposals favored by the FBI would only exempt FBI documents from disclosure for ten years. *See* S.587, 97th Cong., 1st Sess. § 7 (1981).[24]

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[22] *See* 1980 FOIA Hearings at 119 (testimony of K. Prescott Low); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 277-78 (1964) (fear of large damage awards in libel suits inhibits press from publishing).

[23] *See generally, Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 65 (1979) (letter from William H. Webster, FBI Director, proposing total exemption for some FBI files and seven-year moratorium on release of all other FBI files).

[24] In the instant case, Respondent requested materials from the FBI dated October 6, 1969. *See* Brief of Petitioners at 4. Even

The Bureau's construction of Exemption 7(C), in contrast, would permit the perpetual exemption of any document that relates to an identifiable person and was once compiled for law enforcement purposes, regardless of other uses to which the information is later put. It is difficult to conceive of information of public interest compiled by the FBI that does not fall within this broad category. In the case of the FBI, Exemption 7(C) would, in effect, become the blanket exemption that Congress has refused to grant to the Bureau.

The wisdom of the current statutory protection for privacy interests and the deleterious impact of the FBI's construction of Exemption 7(C) on news reporting is perhaps most vividly illustrated by "The Coal Connection," a series of news reports that appeared in *The Kentucky Post* in 1980. The seventeen-part series, detailing the role of organized crime in the American coal industry, has received awards for distinguished journalism from both the Society of Professional Journalists, Sigma Delta Chi [25] and Investigative Reporters and Editors, Inc.[26] Nevertheless, it might not have been written had the FBI's construction of Exemption 7(C) been the law.

The series was based on more than 950 documents obtained under the FOIA from several federal agencies. Many of these documents, although they were not "investigatory records compiled for law enforcement pur-

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under the ten-year moratorium provision of S.587, which the FBI favors, these materials would not be exempt from disclosure.

[25] Society of Professional Journalists, Sigma Delta Chi, Award for Distinguished Investigative Reporting (May 15, 1981).

[26] Investigative Reporters and Editors, Inc., Award for Distinguished Investigative Reporting (June 26, 1981).

poses," 5 U.S.C. § 552(b)(7), did contain information originally acquired in the course of law enforcement investigations. The documents initially requested by *The Kentucky Post* reporters centered around Lester Lee, a clerk in an adult bookstore who was murdered in 1978.[27] After Lee's death, *The Kentucky Post* learned that his wallet contained a check for $2,083 issued by a large coal company and forty-three business cards, most of which bore the names of company presidents, stock brokers, real estate agents, investment bankers, and various public officials.[28] The newspaper's reporters used the FOIA to learn more about Lee. Although the FBI refused to disclose numerous documents, often citing Exemption 7(C), *The Kentucky Post* obtained the same information from the Bureau of Prisons and the Department of the Air Force, two agencies that had previously gained access to the FBI materials and incorporated the information into their own documents. The disclosed materials revealed, *inter alia*, that Lee, a convicted rapist whose name was once listed among the FBI's "Most Wanted Fugitives," was involved for several years with organized crime interests before becoming president of an international coal brokerage company.[29] The company, in turn, made questionable contributions to a 1976 presidential campaign.[30]

Government documents about Lee enabled *The Kentucky Post* to detail the involvement of organized crime

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[27] Ky. Post, May 31, 1980, at 1K, col. 1.

[28] *Id.* at 8K, col. 2.

[29] *Id.* at 8K, col. 3.

[30] *Id.* at 8K, col. 3.

in the American coal industry and the resulting impact on that industry, the government, and the American public. For the first time, the public learned how organized crime interests attained a dominant position in world coal markets in the wake of the coal boom of the mid-1970s.[31] And although the newspaper used government documents to piece together an expose of legally questionable business dealings, the government itself did not use the information in its files to investigate Lee's company. No ongoing federal law enforcement pursuit was jeopardized. *See* 5 U.S.C. § 552(b)(7)(A).

The cornerstone of the newspaper's investigation, the government information about Lee, would have been beyond *The Kentucky Post's* reach if Exemption 7(C) said what the FBI now claims that it says. Lee's military, prison, and parole records would have been permanently quarantined to conceal information once gathered pursuant to a law enforcement investigation, but used later for other purposes. In Lee's case, the information was no longer being used by the FBI, yet it supplied critical leads about questionable conduct to a newspaper in a community affected by that conduct.

Ironically, the 1974 Amendments to Exemption 7(C),[32] relied on by the FBI to support its construc-

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[31] *Id.*

[32] In 1974, Congress amended Exemption 7 by substituting the term "records" for "files" and by limiting the bases for withholding "investigatory records" to six specific instances of harm to governmental or individual interests. The aim of these amendments was to reject a broad construction of the Exemption by the District of Columbia Circuit. *See* Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419

tion of the statute, were written to facilitate precisely the kind of news reporting typified by "The Coal Connection." The House Report specifically notes that the 1974 Amendments should remedy "the relative lack of utilization of the Act by the news media" caused by the delaying tactics of federal agencies claiming broad exemptions from the FOIA. H.R. Rep. No. 1419, 92d Cong., 2d Sess. 8 (1974). Exemption 7 was amended to make certain that *only* specific investigatory "records," and not whole "files," are exempt from disclosure, and *only* when those records are themselves "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7).

CONCLUSION

As written, Exemption 7(C) serves the laudable purpose of ensuring citizens' right of access to information about their government without jeopardizing the legitimate law enforcement activities undertaken by that government. The need for this careful statutory balance has not diminished since 1966 when, in endorsing passage of the FOIA, the Republican Policy Committee expressed the hope that it would end a "period of selective disclosures, managed news, half-truths and admitted distortions."[23] The FBI now seeks to disturb this balance by rendering the agency the sole judge of

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U.S. 974 (1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Weisberg v. Department of Justice, 489 F.2d 1175 (D.C. Cir.) *(en banc), cert. denied*, 416 U.S. 993 (1974).

[23] *See* Republican Policy Committee Statement on Freedom of Information Legislation, S.1160 (June 20, 1966), *reprinted in Staff of Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 59 (Comm. Print 1974).

what the public ought to know.[34] As President Johnson recognized when he signed the statute into law, the FOIA squarely rejects that view of representative government:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.[35]

Amici respectfully request that the judgment below be affirmed.

Respectfully submitted,

BRUCE W. SANFORD
Counsel of Record

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Counsel for Amici

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[34] *See* Brief of Petitioners at 25 ("Disclosure of the withheld segments of information . . . in the FBI files, would not notably aid respondent's asserted purpose, nor would it serve any other purpose 'vital to the functioning of a democratic society.' ") [citation omitted].

[35] H.R. Rep. No. 1419, 89th Cong., 2d Sess. 1 (1966).

APPENDIX

APPENDIX

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

October 8, 1981

Bruce W. Sanford, Esquire
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D. C. 20006

Re: *Federal Bureau of Investigation, et al.* v. *Howard S. Abramson, No. 80-1735*

Dear Mr. Sanford:

In response to your letter of October 5, 1981, I hereby consent, on behalf of the petitioners, to the filing of a brief *amicus curiae* on behalf of the Society of Professional Journalists, Sigma Delta Chi, in this case.

Sincerely,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

SHARON NELSON ABRAMSON
ATTORNEY-AT-LAW
418 D St., S.E., Washington, D.C. 20003, (202) 544-3210

October 12, 1981

Bruce W. Sanford, Esq.
Lee Levine, Esq.
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D.C.

Re: *Federal Bureau of Investigation and the United States Department of Justice* v. *Howard S. Abramson, No. 80-1735*

Dear Messrs. Sanford and Levine:

As counsel to the Respondent in this case we consent to your filing an amicus brief in this proceeding on behalf of a number of national press orgainizations. We understand that you will file this brief no later than October 16, 1981, in compliance with the extension of time granted to the Respondent.

Sincerely,

/s/ SHARON T. NELSON
Sharon T. Nelson